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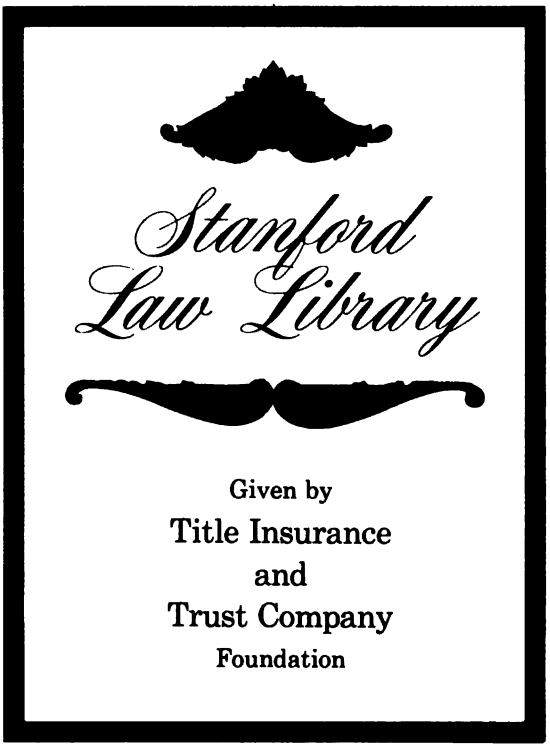
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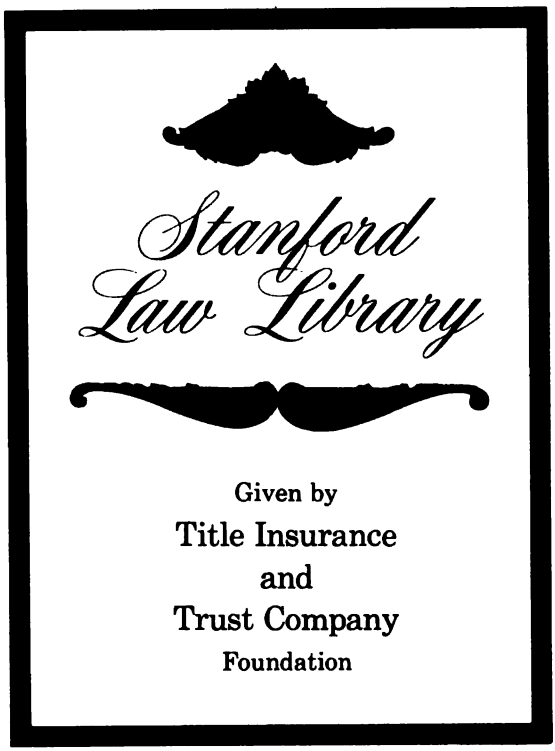
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A

TREATISE

OF THE

LAW OF PROPERTY,

AS ADMINISTERED BY

THE HOUSE OF LORDS.

BY

SIR EDWARD SUGDEN.

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THIS Work is the first attempt which has been made to embody, in the form of a Treatise, the decisions of the House of Lords upon the Law of Property. In the execution of this task the Writer has been led to review, with much care, many decisions of great importance: he has endeavoured to fix his attention wholly on the point of law under consideration, lest the respect and deference due to the authority and learning of the eminent persons who have successively directed or influenced the opinions of the Lords should warp his judgment, and prevent him from freely examining the grounds of their decisions. He considers his observations simply as materials for thinking—the errors into which he has fallen will, no doubt, readily be detected, and the reader will not fail to give to the judgments observed upon all the weight which, but for the object in view, no one would more willingly have accorded to them than the Writer.

The subjects are thus classed: 1st, are the cases on Contract Deeds and Settlements; 2dly, those on Testamentary Dispositions — an important division; 3dly, the cases on Powers which are common to dispositions as well by deed as by will; and, finally, the Authorities bearing upon particular classes, as lessors and lessees, mortgagors and mortgagees, vendors and purchasers: the decisions on the Law

of Husband and Wife are ranged under the head of Settlements. The Writer has endeavoured, by an accurate and simple arrangement of the *material* facts of each case, to enable the reader with facility to comprehend the real question at issue.

The Writer had at his command some materials which have greatly aided him in a portion of his Work: whilst at the bar he retained all the Printed Cases in appeals in which he was counsel, with his own notes, and the notes of the arguments. From this source principally he has been enabled to add the cases not at present reported between 1821 and 1826. Where a case, which he argued, is not reported elsewhere, or the Reports of it do not state by whom it was argued, the fact that he was one of the counsel is mentioned as an intimation that the Writer possessed means of knowledge beyond the mere Printed Case or besides the Report. The Work includes all the cases decided during the last 35 years, including those of the last Session: the latter were stated from the Reports in the Courts below, from the Printed Cases in the House of Lords, and from papers furnished to the Writer: some of the recent cases have been since reported by the regular Reporters of the House.

The Introductory Chapter may interest the general reader; in it is traced the jurisdiction of the House of Lords on Appeals and Writs of Error, with a statement of the objections to the present mode of adjudicating on appeals, and with a statement of the several plans submitted to Parliament for the improvement of the jurisdiction.

Boyle Farm,
11th January 1849.

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ERRATUM.

Page 16, line 5 from bottom, *for* were, *read* was.

INTRODUCTORY CHAPTER.

ON THE JURISDICTION OF THE HOUSE OF LORDS IN APPEALS AND WRITS OF ERROR.

1. *Shafteslbury's speech on the value of the jurisdiction to the House.*
2. *Hale's opinion against any inherent jurisdiction in the House: the claim to original jurisdiction defeated.*
3. *Their power on writs of error not disputed.*
4. *Their power on appeals from equity usurped.*
6. *Exercise of this power traced.*
7. *Disputes thereon between the two Houses: Shirley* v. *Fagg.*
8. *Abandonment by Commons of their opposition.*
9. *Extent of Lords' jurisdiction on appeals.*
10. *Hale's objections to the manner in which the Lords voted on appeals.*
11. *Ancient course of proceeding: the opinion of the Judges followed.*
12. *The cases considered in which the House voted at large on appeals;* 1. *Reeve* v. *Long.*
13. 2. *Carey* v. *Bertie.*
14. 3. *Ashby* v. *White.*
15. 4. *Douglas cause.*
16. 5. *Alexander* v. *Montgomery.*
17. 6. *Hill* v. *St. John.*
18. 7. *Bishop of London* v. *Ffytche.*
19. *Whether the lay Lords should vote.*
20. } *Queen* v. *O'Connell, law Lords only voted.*
21. } *The question of voting considered.*
22. *The authority of the law Lords: suggestions.*
23. *When the Chancellor is the only law Lord; objections.*
24. *When the Keeper of the Great Seal is a commoner.*
25. *Whether the Lords have satisfactorily performed their functions: considered.*
26. *Manner of hearing appeals: counsel.*
27. *Effective court of appeal necessary.*
28. *Sir E. Sugden's proposal in* 1830.
29. *Lord Brougham's in* 1833.
30. *The Government plan in* 1834.
31. *Observations on that plan.*
32. *Supposed plan in* 1835, *with observations.*
33. *Lord Cottenham's plan in* 1836, *and Lord Langdale's* contre projet.
34. *Observations thereon.*
35. *Opinions of the law Lords in* 1839.
36. *Sir E. Sugden's plan in* 1841.

1. LORD SHAFTESBURY, in his celebrated speech in 1675, on Dr. Shirley's appeal cause, upon which the Commons denied the right of the Lords to hear appeals from the courts

of equity (*a*), observed that this matter was no less than the whole of the Lords' judicature, and their judicature was the life and soul of the dignity of the peerage in England; they would quickly grow burthensome if they grew useless; they had then the greatest and most useful end of Parliaments in them, which was, not to make new laws, but to redress grievances and to maintain the old landmarks.

2. Sir Matthew Hale has clearly proved that the House of Lords never had any inherent jurisdiction in judicial matters (*b*). The Lords, however, claimed it, and in the reign of James I. actually exercised original jurisdiction. As early as the reign of Henry IV. the House of Commons stated the judicature to be in the King and Lords only, and not in the Commons (*c*), an admission which was often relied upon against their claim in later times to participate with the Lords in matters of judicature. The Commons failed to establish their claim, and the Lords exercised original jurisdiction for the last time in the case of Skinner and the East India Company, in the second Parliament of Charles II. Their right was warmly opposed by the House of Commons, and ultimately, after violent resolutions and proceedings by both Houses for nearly two years, both Houses, upon the recommendation of the King, erased all records and notices of the matters; and the Lords have never subsequently exercised any original jurisdiction over civil causes between party and party (*d*), nor could the King delegate to them any such authority.

3. The power of the Lords to adjudicate on writs of error has never been disputed; but this power is derived from the Crown. Hale says that all jurisdiction is mediately or immediately derived from the King, and the courts are his courts, and have that style, and consequently judgments there given are virtually given by the King, and therefore it is

(*a*) 4 Parl. Hist. 791.
(*b*) Hale's Jurisd. of H. of Lords.
(*c*) Hale's H. of L. 132.
(*d*) Hargr. Pref. to Hale, 103–127, see p. 184, 197.

not reasonable to have them examined but by the King's writ or commission derived from him specially (*e*). The removing of a record into Parliament for error in ancient times was by petition, but in latter ages by writ, and the writ was anciently, and still, Hale says, ought to be, *per regem* or *per warrantum domini regis*, which was the course till the Long Parliament, when, by reason of the King's absence, he that then exercised the office of Attorney-general did grant his warrant to the cursitor for the making of writs of error returnable in Parliament, and the writ was endorsed *per warrantum attornati domini regis generalis*. And upon that account, Hale adds, it had been also practised since the King's restoration, which was an error, and ought to be reformed (*f*).

4. The authority of the Lords to entertain appeals from courts of equity cannot now be disputed, but it was originally an usurpation, and after violent contests between the two Houses it was left undisturbed, simply because if the power were not in the House of Lords, it would be in the Crown, who might delegate the right to hear such appeals to such commissioners as it thought fit, and the Commons were on this head more jealous of the authority of the Crown than of the Lords. Hale says that the regular appeal from the Court of Chancery is to the King, by petition, praying a rehearing either before the King or such commissioners as he shall appoint by commission under the great seal. The commissioners appointed were usually some of the Privy Council and some of the Judges; and such commissions might issue whether the petition were made to the King in or out of Parliament; the order endorsed on the petition was tantamount to a commission, and the delegation might of course be made to the House of Lords (*g*); or decrees might be set aside by Act of Parliament,

(*e*) Hale's H. of L. 133.
(*f*) Ib. 145. See 11 Geo. 4, & 1 Will. 4, c. 70, s. 8.
(*g*) Hale H. of Lords, 186, 187, 195, 200, 201, 204.

as of course a decree even of the House of Lords, on appeal, still may. Blackstone seems to assume that there would be no appeal if the Lords had not jurisdiction; but this appears to be an error (*h*). Lord Bacon's corrupt practices gave "such a discredit and brand" to the decrees obtained by bribery, that they were easily set aside, and this, with Selden's assistance, led the Lords to enlarge their jurisdiction, not only to appeals, but still further. Hale observes that he could never yet see any precedent of greater antiquity than 3 Car. 1, nay, scarce before the 16 Car. 1, of any such proceeding in the Lords' House (*i*). In the Parliament of 18 Jac. 1, 1621, there was a direct appeal by Sir John Bourchier to the House of Lords from a decree of Lord Keeper Williams, who appears to have allowed an appeal to the Lords, although he refused a further hearing. The Lords' Committee, who were appointed to search for precedents, reported that they could not find that the word *appeal* was usual in any petition for any matter to be brought in thither; but they found that all matters complained of there were by petitions only, the ancient accustomed form thereof being to the King and his great council, and that they could only find one precedent of this nature, which was a complaint against Michael de la Pole, Lord Chancellor, for matters of corruption. The Lords went into an examination of the charge against the Lord Keeper for precipitancy, which was not established, and they censured Bourchier, but they did not touch the merits of the case (*k*); and three years afterwards a decree was reversed by Act of Parliament (*l*). Mathews' case, which occurred at the same period, is conclusive against any alleged inherent jurisdiction in the House of Lords. It was a direct appeal from a decree in Chancery to the Lords, and ulti-

(*h*) 3 Blackst. Comm. 454.

(*i*) Hale, H. of Lords, 193, 194, Harg. Pref. 53.

(*k*) Harg. Preface to Hale, 22; Hale, 195, 1 Parl. Hist. 1364.

(*l*) Hale, 195.

mately the Lords simply contented themselves with ordering the case to be reviewed in Chancery by the Lord Chancellor, assisted by Lords whom the House should nominate, and by two Judges, whom the Lord Keeper was to name; *for which end the Lord Keeper was to be an humble suitor unto his Majesty from the House for a commission unto himself and the Lords that should be named by the House for the said review and final determination of the cause as to them should appear just* (*m*). Hale justly observes that this is an instance of greater weight against the inherent jurisdiction of the Lords than a cart-load of precedents since that time in affirming their jurisdiction (*n*), for it was not done on a sudden, but after several hearings and a report from the Lords' Committee of Petitions for vacating the decree. The King, however, absolutely refused to issue any commission but by his own mandate, and the order was never prosecuted, although the Lord Keeper was made to publicly acknowledge in the Lords' House that the order was just, and to ask pardon of the House: where yet, by the way, observe, says Hale, that every affirmation imposed by the Lords is an affirmation that the reversal of decrees ought to be by commission under the great seal, for that was the order of 21 Jac.

5. It is remarkable that the allegation of the defendant in the last case, was not that the Lords had not any jurisdiction to hear the appeal without an authority from the Crown, but that it had been the course of the House to reverse decrees but by bill legally exhibited, especially when no corruption was proved, and he besought the House that he might not be concluded, and a decree submitted to be overthrown by order of the House only upon a petition (*o*). The defendant, it is presumed, meant that the decree could only be reversed by an Act of Parliament. Acts of Parliament to reverse decrees were not unusual down to and including the

(*m*) Hargr. Pref. to Hale, 38.
(*n*) Hale, 105, 107.
(*o*) Hargr. Pref. to Hale, 40.

fourth Parliament of Charles the 1st, which was prorogued in 1628, at which time three bills for reversing three several decrees of Chancery were depending before the House of Commons (*p*).

6. The first direct reversal by the Lords of a decree was in 1640–1 (*q*), but during the Long Parliament the Lords assumed both original and appellate jurisdiction. Hale says that such a throng of complainants pressed into Parliament, especially into the Lords' House, as transported proceedings in that House beyond the known ancient and regular bounds thereof. Complaints of decrees, sentences, and judgments came in apace and were promiscuously heard; and, indeed, he adds, it would be too hard a task for any person to justify all proceedings of that time to be consonant to the ancient and regular proceedings of Parliament (*r*). Cromwell in his ordinance (*s*) for regulating the Court of Chancery, provided a court of appeal, consisting of the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, and six Judges, two out of each court, of which six Judges, the Chief Justice of one of the benches, or Chief Baron of the Exchequer was to be one, and the majority was to decide; but the party before he was to be allowed to appeal was to perform the decree, except where it would extinguish his legal right, and was to deposit 50*l.* to answer all costs; and if the decree was not altered he was to pay full costs, to be allowed by the chief clerks in Chancery, together with such addition of costs for his causeless vexation as they should think fit (I).

(*p*) Harg. Pref. 53, 54.
(*q*) Ib. 58, 59, and n.
(*r*) Hale, 194.
(*s*) Scobell's Acts, p. 331, 1654, c. 44, s. 63. Whitelock's Mem. 621. Harg. Pref. 64.

(I) This ordinance was made without the advice of the Lords Commissioners of the Great Seal, Whitelock, Widdrington, and Lisle: they objected to it as in some respects illegal. Whitelock and Widdrington, and Lenthal, Master of the Rolls, declared their reasons against it, but Lisle "was wholly for the execution of it." One of the rules was, that every cause should be heard the same day on which it was set down for hearing. This shows that

7. Hale's opinion was clearly against any inherent jurisdiction in the Lords to hear appeals from courts of equity; and Lord Nottingham seems to have been of the same opinion (*t*). After the Lords had abandoned their claim to original jurisdiction, they continued to hear appeals from Chancery. In 1675, in Charles the 2d's long Parliament, the case of Dr. Shirley and Fagg came before the Lords on appeal from Chancery, together with two other cases; in all of them the defendants were members of the House of Commons, so that the question of privilege was mixed up with the general question of the right of the Lords to hear such appeals(*u*). The Commons took up the question with great

(*t*) Hargr. Pref. 152 n. (*u*) Ib. 135.

the Judges had not been consulted as to all the rules, for the objection to this rule was that it engaged "to act an impossibility, for causes of equity depend upon so many circumstances in cases of frauds and trusts, that three or four days was not sometimes sufficient for the orderly hearing of one cause." The makers of the ordinance (the Protector and his Council) would not endure that their power to make it should be doubted, yet they connived at the non-execution of it. However, upon a letter from Whitelock, Widdrington, and Lenthal, stating that they could not give themselves satisfaction, so as to be free to proceed upon that ordinance, Whitelock and Widdrington were deprived of the Great Seal: but Lenthal, Whitelock says, who seemed most earnest against the execution of this ordinance, and protested that he would be hanged at the Rolls-gate before he would execute it, yet now, when he saw Widdrington and himself (Whitelock) put out of their places for refusing to do it, he wheeled about, and was as forward as any one to act in the execution of it, and thereby restored himself to their favour. Whitelock returned to his profession, "upon which he received many fees," but was soon again taken into favour, and provided for at the Treasury. But in the meantime, Whitelock says, his fortunes and interest decreased, and then his former pretended dear friends and frequent visitors withdrew themselves from him, and began neither to own nor to know him. Such, he adds, is the course of dirty worldlings, but he valued not these loaf friends and hypocrites. The Protector kept the Seal in his own custody for some days, and had the business of sealing despatched by the officers in his chamber, and afterwards delivered the Seal to Colonel Fiennis and Lisle, "our late brother who was for all assays;" and of these two, Whitelock informs us the one of them never had experience in matters of this nature, and the other had as little knowledge of them, till by accompanying Whitelock and Widdrington he gained some, and now he carried the busi-

resolution, and resorted to strong measures to stop the appeals. The Lords declared that it was the undoubted right of the Lords in judicature to receive and determine in time of Parliament appeals from inferior courts though a member of either House were concerned, and from this right and the exercise thereof their Lordships would not depart. The Commons committed the counsel who had argued the case before the Lords, although they did so by the Lords' order. The Lords represented the House of Lords as the place where the King is highest in his royal estate, and where the last resort of judging upon writs of error and appeals in equity in all cases, and over all persons, was undoubtedly fixed and permanently lodged. The Commons

ness very high and superciliously. Whitelock had afterwards some reason to complain of his brother sufferer Widdrington; for the latter, having been chosen Speaker of the Parliament, fell ill, and Whitelock was desired to take the chair during his absence, and he was treated as Speaker, and was to have the profits due to the Speaker; but Widdrington being informed of the great favour of the Parliament to their new Speaker, and that several private Bills were ready to pass, and particularly for naturalizing of many strangers, and every one of them was to pay 5*l.* to the Speaker for his fee, which Whitelock would receive in case he did not take his place again before the passing of these Bills; he (Widdrington) being desirous of the money, though to the hazard of his life, came again to the House, and took his place, though very weak and feeble. The House, however, rewarded Whitelock. Memorials, 654, 655. But lawyers were not in great repute with the Court. Whitelock says, that the Lord General Fleetwood told him that he had some enemies at Court, who were willing to keep him from being of the Council. One of their objections was *that he was a lawyer*, and they would show that the Councils might be carried on without the wisdom of lawyers, which would but trouble and interrupt their proceedings, by telling them what was law upon every occasion, and their affairs would not permit to tie up themselves to those rules of law. To which objection Whitelock answered, that he accounted his profession his greatest honour, and that it did not make him the less capable of serving his country, as the late long Parliament thought, by whom he was constantly elected to be of the Council, and former ages had the like good opinion of his profession; but if the present age were wiser than their ancestors, it was because they had 200,000 men in arms to prove them so; and if they disliked the profession of the law, it was because the law was the only opposer of unlimited will and arbitrariness, which did not love to be curbed. Memorials, 644.

replied that the King was highest in his royal estate in full Parliament, and they could not find the Lords to have any jurisdiction in cases of appeal from courts of equity by Magna Charta or by any law or custom of Parliament. Violent proceedings on the part of both Houses were put a stop to by a prorogation, but upon the meeting of Parliament a few months afterwards, the Lords resolved to proceed to a hearing of Dr. Shirley's appeal. This produced a resolution of the House of Commons: That whereas the House had been informed of several appeals depending in the House of Lords from courts of equity, to the great violation of the rights and liberty of the Commons of England, it was resolved and declared that whoever should solicit, plead, or prosecute any appeal against any commoner of England from any court of equity before the House of Lords, should be deemed and taken a betrayer of the rights and liberties of the people of England, and should be proceeded against accordingly; and this was to be affixed in Westminster Hall and other public places. This the Lords declared to be illegal, unparliamentary, and tending to the dissolution of the government. Both houses again had recourse to violent measures, which were stopped by a long prorogation. When the new session commenced, the Lords heard appeals from equity without any further interruption from the Commons (*v*).

8. No Parliament was held between March 1681 and the death of Charles the Second, so that there could be no appeals to the Lords for four or five years; but still the King did not yield to the prayer of a petition by a barrister to rehear a case decided by Lord Nottingham in his (the King's) own person, or to appoint commissioners for the purpose (*x*). This is the last attempt to supply another jurisdiction, and, with the exception of a statement by the Commons in the Aylesbury case, in the early part of Queen

(*v*) Hargr. Pref. 135—178. (*x*) Ib. 179.

Ann's reign (*y*), in which the Lords' jurisdiction in hearing appeals from courts of equity is treated as an usurpation easily traced, and though often denied and protested against, yet still exercised, and almost every Session of Parliament extended, the right of the Lords has ever since been exercised without dispute. The Lords, in a conference with the Commons on that occasion, stated that the Lords were the great court of judicature, and when the courts below have differed in opinion, there has been resort to the Lords for their judgment, as in the case of kindred of half-blood claiming shares of intestates' effects (*z*). In 1683 the Lord Keeper said that even from the Court of Chancery there formerly lay an appeal to the King, and that was the *course* till the House of Lords, which is the highest court, had frequent meetings and then determined all matters upon appeal (*a*).

9. The Lords hear appeals in equity even on interlocutory orders, but the Lords have not appellant jurisdiction over cases heard in the ecclesiastical or maritime courts, or cases determined in the colonies, or in bankruptcy or lunacy (*b*), or upon an order of the Court of Chancery respecting an award upon a submission to reference under the statute (*c*), and it has been much doubted whether the House has jurisdiction over cases disposed of by the courts by a summary proceeding (*d*). Lord Redesdale observed, that the jurisdiction, he believed, was formerly much more extensive than it had been exercised now for many centuries. It was, he said, much debated formerly whether orders in the matter of appointing guardians could be the subject of appeal (*e*); nor does the appellant jurisdiction of the House

(*y*) 1704–5, Hargr. Pref. 204 n.; 6 Parl. Hist. 391.

(*z*) 6 Parl. Hist. 402, 403; the case referred to by the Lords is Watts *v.* Crooke, Show. P. C. 108.

(*a*) See 1 Vern. 178.

(*b*) See 1 Vern. 177, 184, 443; Rochfort *v.* Ld. Ely, 1 Bro. P. C. by Toml. 450.

(*c*) O'Sullivan *v.* Hutchins, 3 Bligh, N. S. 474.

(*d*) O'Neill *v.* Fitzgerald, 3 Bligh, N. S. 24.

(*e*) 3 Bligh, N. S. 34.

extend to powers given by Act of Parliament expressly to a court below for a particular object: as where lands subject to mortgages had been seized under an extent, and a commission of bankrupt afterwards issued against the mortgagor, and then an Act of Parliament was passed enabling the Court of Exchequer to refer it to the Master to ascertain priorities &c., and to make orders respecting the funds in court under the extent, upon motion or petition, as in causes of equity—an appeal against an order made under this Act was held not to be within the jurisdiction of the Lords (*f*); nor does an appeal lie from an order made by consent (*g*). The House in sitting upon appeals varies its character according to the place from which the appeal comes: if from a court of law, it pronounces judgment as a court of law; if from a court of equity, it pronounces the decree which the court below ought to have pronounced. In Scotch and Irish appeals it acts upon its own knowledge of the law, both of Scotland, or Ireland, and England (*h*).

10. The manner in which the House of Lords exercised this appellant jurisdiction gave rise to just exceptions. Sir Matthew Hale states that judgment in the Lords ordinarily, in his day, was given by a majority of voices, which yet notwithstanding had been found a great inconvenience; for though, he observes, the Lords spiritual be learned men in their way, and though the temporal Lords are usually of a noble extraction and generous education, and possibly well acquainted with the methods of government, yet it was impossible they should be skilled in judicial proceedings and matters of law, which requires great study and experience to fit persons thereunto; and besides many of them were young and unacquainted with business, especially of this

(*f*) Attorney-General *v.* Wall, 3 Bligh, N. S. 57 n., and in 52 Geo. 3, c. 101.

(*g*) Toler *v.* Sansom, 1 Bro. P. C. by Toml. 468; see Morris *v.* Davies, 5 Cla. & Fin. 163; see the head of Appeal, 1 Bro. P. C. by Toml. 434.

(*h*) Douglas *v.* Brown, 2 Dow & Cla. 171.

nature; so that certainly it was a great inconvenience that men's estates and interests, and the judgments of learned Judges, given with great deliberation and advice, should be subject to be shaken and, it might be, overthrown by, it might be, one single content or non-content. Whatever the extraction of men be, yet they were not born with the knowledge of the municipal laws of a kingdom, nor could be supposed to be inspired with the knowledge of the law by the acquest or descent of a title of honour (*i*). For these reasons, in another chapter, he asks, with reference to decrees in equity, what kind of uncertainty shall we find, when an hundred or more unexperienced men shall be judges of causes in equity? And he concludes that they *daily observed,* that in particular cases, when they came before a multitude of judges, especially that were great men, and therefore not easily controllable, persons concerned in suits met with some that were their kindred, friends, favourers, landlords, tenants, or relatives; and it was grown a fashion in the Lords' House for Lords to patronize petitions, a course that, if it were used by the Judges of Westminster Hall, would be looked upon even by the Parliament itself as undecent, and carrying a probable imputation or temptation at least to partiality. Such addresses as these were undecent and unsafe, indeed intolerable, to be found among Judges, who must not know persons in judgment, nor be sweetened by such kind of applications (I). Yet he left it to any observing person to consider whether he thought it possible, or indeed probable, that these applications would be avoided to so many and so great persons, and of such extensive relationship. These and many more inconveniences, he concludes, attend this judicature in the Lords' House (*k*). Shaftesbury, in the speech, with a portion of

(*i*) Hale, House of Lords, 155. (*k*) Hale, 201.

(I) Hale, as Judge on circuit, was by custom entitled to six loaves of sugar from a corporation, which he insisted upon paying for, because the corporation had a case before him for trial.

which this introduction commences, after referring to various expedients for securing the justice of the nation, and yet take the right of appeal from their Lordships, said, he must deal freely with them; these things could never have risen in men's minds, but that there had been some kind of provocation that had given the first rise to it. He prayed the Lords to forgive him if, on this occasion, he put them in mind of committee dinners, and the scandal of it; those droves of ladies that attended all causes; it was come to that pass that men even hired or borrowed of their friends handsome sisters or daughters to deliver their petitions. But yet for all that, he must say that their judgments had been sacred, unless in one or two causes, and these they owed most to that bench from whence they now apprehended the most danger (*l*) (I).

11. In ancient times, Hale says there were provisional remedies for the inconvenience in the judicatory of the House of Lords: 1. These proceedings were, for the most part, if not altogether, transacted by the *consilium regis ordinarium*, the Chancellor, Treasurer, Justices, Barons of the Exchequer, and those whose education and experience rendered them more fit for such employment; and rarely did these matters come into the House of Lords for their de-

(*l*) 4 Parl. Hist. 796.

(I) Burnet, after stating that Charles II. went commonly to the House of Lords, and pointing out the evil attending it, observes that the King's going thither had a much worse effect, for he became a common solicitor, not only in public affairs but even in private matters of justice. He would in a very little time have gone round the house and spoke to every man that he thought worth speaking to. And he was apt to do that upon the solicitation of any of the ladies in favour, or of any that had credit with them. He knew well on whom he could prevail, so being once, in a matter of justice, desired to speak to the Earl of Essex and the Lord Hollis, he said they were stiff and sullen men; but when he was next desired to solicit two others, he undertook to do it, and said "They are men of no conscience, so I will take the government of their conscience into my own hands." Yet when any of the Lords told him plainly that they could not vote as he desired, he seemed to take it well from them. Vol. 1, 472, 473, edit. 1823.

cision, unless it were in cases of great moment. 2. When they came to the House of Lords upon such an account, the *consilium regis ordinarium*, the Chancellor, Treasurer, and Justices, had not only a voice of advice, but also of suffrage. 3. It was most evident, beyond all dispute, that though the record, either by writ or petition, were removed into the Lords' House, and virtually and interpretatively the judgment of affirmance or reversal was theirs, yet the actual decision and determination (in ancient times even after the decay of the power of the *consilium regis*) was given by a select number of Lords and Judges nominated by the King in Parliament, or at least by the King with the advice of the Lords (*m*). Hale adds, that it is true the course above-mentioned was then grown much out of use, and the Lords give the judgments themselves. But yet even therein, since the time that the whole decision of errors had been practised in the House of Lords by their votes, the Judges had been always consulted withal, and their opinion held so sacred that the Lords had ever conformed their judgments thereunto, unless in cases where all the Judges were parties to the former judgment, as in the case of ship money (*n*).

12. Hale strongly enforces this view, which appears to be the true one, and says, that though for many years last past the Judges had had only voices of advice and assistance, not authoritative or decisive, yet their opinions had always been the rules whereby the Lords did or should proceed in matters of law, especially between party and party. Yet a year before his death he had the mortification to see the judgments of the Common Pleas and King's Bench, upon a mere point of law, reversed by the House of Lords against the opinion of all the Judges (*o*). The entry is a

(*m*) Hale, H. of Lords, 155, 156.

(*n*) Hale, 158, 159.

(*o*) Reeve *v.* Long, 1 Salk. 227; 15 Lords' Journals, 446; see 11 Cla. & Fin. 425, n., where the cases are collected, and see Fitzgerald *v.* Fauconberge, Fitz. 207; 6 Bro. P.C. by T. 295; 1 Sugd. Pow. 267.

simple order of reversal of the judgment given in the Court of Common Pleas, and the affirmance thereof in the Court of King's Bench. It is quoted as one of the cases in which Lords, not being law Lords, voted; and this is warranted by the statement of Levins, who was counsel for the plaintiff in the ejectment, that the judgment was reversed by almost all the Lords in Parliament (*p*). It appears that many spiritual as well as temporal Lords were present. Lord Rosslyn observed, in Thellusson *v.* Woodford (*q*), that it ought always to be remembered it was the decision of Lord Somers, and that was not the only case in which he stood against the majority of the Judges, and the better consideration of subsequent times had shown his opinion deserved all the regard generally paid to it. But Levins informs us that *all* the Judges were strongly dissatisfied with the judgment of the Lords, and did not change their opinions upon this point, but strongly blamed Baron Turton for permitting it to be found specially, *where the law was so certain and clear.* We must not be led astray by great names. The decision by the Lords was contrary to the settled law, and was in truth wholly beyond their jurisdiction. They did not decide according to law, but created new law. The decision of the Lords certainly overruled Archer's case, 1 Co. 66, and decided that a posthumous child was to be taken to all intents and purposes as born at the time the particular estate determined (*r*). The ground of the decision was that the limitation was in a will, but the rule of law applied equally to wills and settlements. A few years afterwards the House of Commons, in reproof, it is said, of this assumption of legislative authority (*s*), brought in a bill which applied the new rule to settlements (*t*); for it was of course known that the Judges would not alter the rule as regarded limitations in deeds. The decision of the Lords

(*p*) 3 Lev. 408.
(*q*) 4 Ves. jun. 342.
(*r*) 4 Ves. 342.
(*s*) Christian's n. to 2 Black. Com. 169, where it is said the bill was immediately brought in.
(*t*) 10 & 11 W. 3, c. 16.

did not require an Act of Parliament to affirm it, although it might have been reversed by Act of Parliament. Mr. Butler has observed, that there is a tradition that as the case of Reeve *v.* Long arose upon a will, the Lords considered the law to be settled by their determination in that case, and were unwilling to make any express mention of limitations or devises made by wills, lest it should appear to call in question the authority or propriety of their determination (*u*). It appears from the Journals that the Lords made an amendment in the bill, to which the Commons agreed: the bill originally probably applied to wills as well as to deeds, and was confined by the amendment to settlements (*x*). The law is of course now clear upon both.

13. Lord Somers quickly had his own precedent brought to bear against one of his own decisions. In Cary *v.* Bertie or Bertie *v.* Falkland (*y*), where the devise was to trustees to pay the testator's debts, and then in trust for Elizabeth Willoughby, in case she should within three years after his death be married to Lord Guilford, for her life, and after her death in case such marriage was had, to their first and other sons in tail male; and in default of such issue, or in case such marriage should not take effect within the said three years, in trust for Lord Falkland for life with remainders over, and there was a codicil clearly denoting the same intentions; Lord Somers (assisted by Treby, C. J. and Holt, C. J.) decided, upon grounds which ought not to have been disputed, that parol evidence of the testator's declarations of his intent were inadmissible, and that the condition was a precedent one, and the marriage not having been had within the three years, [it was never solemnized, and the lady married Mr. Bertie], the limitations to the lady and her issue by Lord Guilford never took effect. From this decree there was an

(*u*) N. 3, Co. Litt. 298 a.

(*x*) Lords' Journals, 18th, 24th, 27th, 28th April 1690. The title of the Act is general.

(*y*) 2 Vern. 333; 12 Mod. 182; 1 Salk. 231; 3 Cha. Ca. 129; and see Kettle *v.* Townsend, 1 Salk. 186; Prec. Cha. 477; 1 P. Wms. 61, and the note.

immediate appeal to the Lords, and Mr. Bertie, who was a Member of the Lower House, having published a pamphlet reflecting on the Lord Chancellor for his judgment, the Lords voted it a false and scandalous libel, but upon Lord Abingdon, in his place, declaring in the name of his son that he did ask pardon of the House and the Lord Chancellor for the son's offence, which the House and the Lord Chancellor accepted, the Lords ordered the paper to be burnt by the common hangman (*z*). There was a large attendance of Peers on the day the appeal was heard, and after hearing counsel and a debate thereon, it was adjourned, and *all the Lords present* to be summoned then to attend, and the Judges also. Upon the resumption of the debate the Lords resolved to relieve the appellants, whereupon 21 Peers signed a protest; the matter was again adjourned, and it was subsequently resolved that the relief should be by giving to the appellants the enjoyment of the estate during Mrs. Bertie's life. Thirteen Lords signed a protest against this resolution. Finally the Lords had a draft of the judgment prepared by two of the Judges, and so it was decreed. Upon the several hearings of the case Lord Somers, C. was present. In Vernon it is stated that the case ended by compromise (*a*), and so it is stated in 12 Modern (*b*), but in Salkeld (*c*) it is correctly stated that the decree was reversed. Colles, who gives a true account of the decision in the Lords, stated that there being contradictory accounts of the fate of the appeal, some books saying that the decree was reversed, and others that the business was ended by compromise, and some not speaking of any appeal, the fact was stated by him from the Lords' Journals (*d*). Yet later writers quote the case as a decision by Lord Somers against the gift to Mrs. Bertie taking effect, and do not refer to the reversal of the decree

(*z*) 16 Lords' Journals, 230, 236, 237, 240, 241, 247, 248.
(*a*) 2 Vern. 344.
(*b*) P. 185.
(*c*) 1 Salk. 231.
(*d*) Colles' P. C. 13.

by the Lords (*e*), which proves how little weight was attached to the erroneous judgment pronounced by the Lords.

14. In the great case of Ashby *v.* White (*f*) it was decided by three Judges against Holt, C. J. that an action on the case would not lie by a burgess against the returning officer for refusing his vote at an election of Members to serve in Parliament. Upon a writ of error to the House of Lords the judgment was reversed. It appears that two of the Judges were absent, and the other 10 were equally divided in opinion, for although Tracy doubted upon the manner of laying the declaration, he agreed clearly that the action lay (*g*). This left it fairly open to the decision of the House itself, and upon a division 50 Lords voted for the reversal, against 16, of which last number 13 signed a protest (*h*). The House of Commons voted Ashby, the plaintiff, guilty of a breach of the privileges of that House for bringing the action, and, as we have seen, treated the Lords' jurisdiction on appeals from decrees in courts of equity as an usurpation.

15. After a long interval (I) the great Douglas cause, described by the Lord Chancellor as perhaps the most solemn and important cause ever heard at the bar of the House of Lords, led to a difference of opinion in the Lords between the law Lords and some of the other Peers; the Court of Session in Scotland had decided in favour of the Duke of

(*e*) 1 Pow. Dev. by Jarm. 183, 184, and n. 469; 2 Pow. 261; 1 Jarm. Wills, 806.

(*f*) 2 Lord Raym. 938; 6 Mod. 45; 1 Salk. 19, and other books.

(*g*) 2 Lord Raym. 958.

(*h*) 17 Lords' Journals, 369; 11 Cla. & Fin. 425, n.

(I) In the interval, however, in 1730, the Lords generally had voted in Fitzgerald *v.* Fauconberge, where the decree was made by Lord King, C. assisted by the Master of the Rolls and C. B. Reynolds, which was supported in the House of Lords by the opinions of six Judges against one, nevertheless 13 Lords voted for reversing the decree, but 22 for affirming it. It was a case wholly beyond the competence of the lay Lords. There are probably other cases, but I have not considered it necessary to search for them. See Fitz. 207; 6 Bro. P. C. by T. 295; 1 Sugd. Pow. 267.

Hamilton against Mr. Douglas, thereby establishing that the latter was not the son of Lady Jane Douglas. It was a question of fact; Lord Chancellor Camden and Lord Mansfield, C. J., were of opinion that Mr. Douglas was the son of Lady Jane; the Duke of Bedford, who spoke after the Chancellor, and before the Chief Justice, maintained the contrary opinion (I). The interlocutor was reversed, but the Duke of Bedford and four other lay Peers signed a protest, on the ground that Douglas had not proved himself to be the son of Lady Jane, and that, in their opinion, it was proved that he was not her son (*i*). In this case the opinion of the law Lords prevailed, but the question is one upon which men's minds have ever differed; and it was within the reach of any well-educated man of business-like habits who devoted his attention to it; it was therefore a case in which lay Peers who had made themselves masters of the case might vote without impeachment. It is satisfactory to find that the Duke of Bedford, who spoke on the subject, had diligently attended throughout the argument of the case.

16. This case was followed by the case of Alexander *v.* Montgomery in 1773, where the Lord Ordinary found that letters respecting a sale of coals in a mine did not amount to a finished bargain, so as to be binding upon the parties. The Lords of Session however held that by the letters a bar-

(*i*) 32 Lords' Journals, 264; 2 Collec. Jurid. 386; 16 Parl. Hist. 518.

(I) The Duke, in his private journal, which is inserted in Cavendish's Debates, p. 618, made the following entries:—"27 Feb. 1769, at the House. Begun on the debate on the Douglas Cause a little after 11 A. M., finished a little after 9. The speakers were the Duke of Newcastle, Earl of Sandwich, Lord Chancellor, myself, and Lord Mansfield. It was decided in favour of Mr. Douglas, upon the question, but without dividing the House. 1 March, I protested against the decision of the House." The editor adds the following note:—"It appears by the Journal that the Duke diligently attended the House during the 12 days hearing of counsel. The opening speech of the Lord Advocate of Scotland, Mr. Montgomery, occupied 12 hours. The other counsel were Sir Fletcher Norton, Mr. Charles Yorke, Mr. Wedderburn and Mr. Dunning."

gain was agreed on and concluded between the parties, binding upon both; but upon an appeal the Court (by the narrowest majority) found that no finished bargain was concluded so as to be binding upon the parties (*k*). After debate in the House of Lords upon the appeal there, the question was put, and tellers appointed, and votes were equal, four for reversing and four for affirming; whereupon it was determined in the negative, that the interlocutor should not be reversed (*l*). The appeal was accordingly dismissed, and the interlocutor affirmed. The question in this case was one of a technical nature, and upon which lay Lords could hardly be deemed competent to form a judicial opinion.

17. Two years afterwards a question upon a will depending upon construction according to the rules of law came before the House upon divided opinions. This was the case of Hill *v.* St. John (*m*), where the question was whether an advowson actually conveyed to the testator passed by his will under a devise of all the manors, advowsons, &c. for the purchase whereof he had already contracted and agreed, or in lieu thereof certain monies, the testator having then a contract for the purchase of an advowson not completed. The Court of Common Pleas decided that the advowson which had been already conveyed to the testator did not pass by the will. Upon a writ of error, the Court of King's Bench reversed that decision, and held that the advowson did pass. Upon a writ of error to the Lords the Barons of the Exchequer were called in, and Smythe, C. B. agreed with the Court of King's Bench, and the other Barons with the Court of Common Pleas, which latter opinion Blackstone informs us was also strongly supported in argument by Lord Apsley, Chancellor, and Lord Camden, the only law Lords in the House; nevertheless, the judg-

(*k*) Printed Cas. D. P. 1773.

(*l*) 33 Lords' Journals, 519.

(*m*) 2 Blackst. 930; Cowp. 95; 3 Bro. P. C. by Toml. 375; 34 Lords' Journals, 443.

ment of the Court of King's Bench was affirmed without a division. A day or two after which a motion was made to rehear the cause, it being alleged that the majority of the Lords present were clearly for reversing the judgment of the King's Bench, though, by a surprise, they did not divide the House; but the fact being not clearly ascertained, and also for the danger of such a precedent, the motion was withdrawn by consent (*n*). This was a remarkable case: the authorities were equally balanced in the courts below, but the majority of the Judges whose opinions were delivered to the House, and the opinions of the Lord Chancellor and Lord Camden, the *only* law Lords in the House, were adverse to the decision of the Court of King's Bench; and looking at the whole of the will, the legal opinions in the House ought to have induced the Lords to reverse the decision of the King's Bench. It would have been desirable if the decision in that case had been left to the law Lords, who supported the opinion of the majority of the Judges.

18. The last great case in which the Peers generally voted on a legal question is that of the Bishop of London *v.* Ffytche (*o*). The question was, whether a general bond of resignation, given by a clerk on his promotion to a living, to his patron, was valid. Its validity, in this case, where unattended by any illegal circumstance, was decided by the Court of Common Pleas, and their decision was affirmed by the Court of King's Bench. The courts could not decide otherwise, as the point had been so settled for nearly two centuries, although courts of equity would not permit an improper use to be made of such bonds. Upon an appeal by the Bishop to the House of Lords many questions were put to the Judges; but the substance was, whether such

(*n*) See 2 Blackst. 933; Sugd. Purch. 195.

(*o*) 2 Bro. P. C. by Toml. 211; 1 East, 487; Cunn. Sim. 52; 3 Burn Eccl. Law, tit. Simony; 23 Parl. Hist. 876; 36 Lords' Journals, 687. It is singular that the head note to the report, in Bro. by Toml. states, in the face of the decision by the Lords, that the bond is good.

a bond was valid, and whether its illegality, if invalid, could be taken advantage of on the pleadings. Seven of the Judges delivered their opinions *seriatim* in favour of the validity of the bond; and the remaining Judge was of opinion that such a bond was illegal, but still was of opinion that, upon the pleadings, it was not competent for the plaintiff in error to object to the validity of the bond stated in the pleadings; and therefore it was to be taken to be good, and not corrupt and void in law. The opinions therefore of *all* the Judges were in favour of the decisions in the courts of law. Three bishops spoke against the validity of the bond. They put the reversal of the decision in the courts below upon dangerous ground. Much reverence, it was said, was due to such decisions of our courts as have been uniform and long acquiesced in; but if, in succeeding times, great and manifold inconveniences shall be found to arise from persisting in such determinations, and no inconvenience from altering them, the case was too plain for the House to be told what ought to be done. One prelate observed that the *stare decisis*, the *stare super antiquas vias*, was a maxim of law sanctified by such length of usage, such weight of authority, that he durst not produce any of the arguments which suggested themselves to his mind in opposition to it, though some of them tended to question its validity, and some of them its justice. It was a maxim which his hitherto course of studies had not brought him much acquainted with. It was not admitted in philosophy, it was not admitted in divinity; for divines do not allow that there are any infallible interpreters of the Bible, which is their statute book. Supposing the case were similar in all its circumstances to some one or more of the cases which had been adjudged below, still it would not follow that the House of Lords was to be bound by the precedents of those courts; if it was, the right of appeal was nugatory. He then proceeded to maintain that the House of Lords was bound by no precedents in the courts of law, but could

reverse them whenever they came before them. Such doctrines as these would, if maintained, indeed shake to their foundations all legal rights not settled by the House of Lords itself, and give to that House exclusive legislative authority. It has the power to declare the law, and reverse erroneous decisions; but it has not entrusted to it the power to remove land-marks, and to decide, not according to law, but according to its own views of what should be law. The point in question could not fail to interest the heads of the Church; and if it had been *res integra*, there were powerful reasons for holding such bonds to be illegal. But the grounds to which I have referred were such as might well alarm a learned Lord on the woolsack. Lord Thurlow, C., however, supported the view taken by the bishops, and moved the reversal of the judgments of the Courts of Common Pleas and King's Bench, which was carried, upon a division, by 19 against 18. And thus the opinions of *all* the Judges of England upon a pure legal question, which had been settled for nearly two centuries, was overruled by the House of Lords, upon the simple authority of the Chancellor. The Judges in later cases only followed the decision of the Lords where the circumstances were the same; they did not adopt the principle of the decision (*p*). In one case Lord Kenyon, C. J., said he avoided urging anything respecting the case of the Bishop of London *v.* Ffytche; when that question came again before the House of Lords, they would, he had no doubt, review the former decision, if it should be thought necessary (*q*). And in another case the Court of King's Bench declared that, as the case before them was not precisely similar to the case of the Bishop of London *v.* Ffytche, *they were bound by the established series of precedents* to give judgment for the plaintiff, that is, to decide in favour of the validity of the bond (*r*). And in a later case a Judge observed that he knew that since the

(*p*) Bagshaw *v.* Bossley, 4 T. Rep. 78.
(*q*) 4 T. Rep. 81, 82.
(*r*) Partridge *v.* Whiston, 4 T. Rep. 359.

case of the Bishop of London *v.* Ffytche it had been considered that bonds of resignation, in favour of specified persons, were not illegal (*s*). Lord Eldon evidently found it to be impossible to reconcile upon principle the cases subsequent to the decision in the Lords with that decision (*t*). At length the question arose upon the validity of a bond of resignation, where the object was limited to a provision for one of two younger brothers of the patron, when capable of holding. The bond was held to be valid by three Judges of the King's Bench, in the absence of the Chief Justice, and their judgment was affirmed in the Exchequer Chamber. When the case reached the House of Lords the Judges were summoned. The three Judges who decided the case originally gave no opinion to the House; of the remaining nine, six were of opinion against the validity of the bond, and they held themselves to be bound by the case of the Bishop of London *v.* Ffytche: the other three were of opinion that the bond was valid; so that the Judges were, in fact, equally divided in opinion. One of the learned Judges said that he presumed he was to understand himself as bound by the case of the Bishop of London *v.* Ffytche, and to treat that case as the foundation of his argument; if so, he then had no difficulty in stating his opinion that the judgment below could not be supported. Lord Eldon, C., held that the House was bound by their former decision (I), and that this case fell within the principle of it. Upon his motion, therefore, after a long delay, the judgments in the Courts below were

(*s*) Newman *v.* Newman, 4 Mau. & Selw. 66.

(*t*) See Dashwood *v.* Peyton, 18 Ves. 27; Rowlatt *v.* Rowlatt, 1 Jac. & Walk. 280.

(I) In a case in the Court of Chancery, Lord Eldon said that the rule of law (as established by that House) must remain *till altered by the House of Lords*, 6 Ves. 548. Of course the House can review its own decision as a rule of law, although it will not rehear the particular case. In Watts *v.* Bullas, 1 P. Wms. 61, the Master of the Rolls observed of Kettle *v.* Townsend, that if the same case were to come then into the House of Lords, it would be ruled the other way.

reversed (*u*). An Act was afterwards passed to relieve patrons and incumbents from the penalties to which they were liable under the law, as it had been administered in the courts below (*v*), and finally by another Act (*x*), the law, as established by the Lords, was altered, and bonds of resignation were rendered valid, under certain restrictions, where the object was to provide for one person specially named, or one or two persons nearly connected with the patron by blood or marriage, and specially named. Thus the law was put upon a just foundation, as it ought to have been at first, by an Act of the Legislature. It is impossible to trace the progress of the decisions—the real conflict between the court of appeal, and the courts below—without being sensible of the evils inflicted upon the administration of justice, by the decision of the House in the case of the Bishop of London *v.* Ffytche.

19. This cursory view of the effect of the interference of the lay Lords in the decisions of the House upon legal questions will probably satisfy the learned reader, that although it would not be expedient to deprive any Peer of the right to vote upon such questions, yet it is a privilege which should rarely be exercised (I). The present rule which enforces the attendance of three Peers on appeals, under which one Peer frequently hears a portion of the argument, and another the conclusion, renders it difficult for lay Peers to vote in the general run of cases;

(*u*) Fletcher *v.* Lord Sondes, 1 Bligh, N. S. 144.

(*v*) 7 & 8 Geo. 4, c. 25.

(*x*) 9 Geo. 4, c. 94.

(I) What could be more absurd than that the decrees of a Judge who was competent to the performance of his task should be reversed by a body of Peers who were entirely ignorant of every matter relating to the administration of the law? Had this practically been the case, the glaring absurdity of the practice would have rendered it intolerable; but the great body of the Peers acquiesced in the decision of the Lord Chancellor, and he was in fact the sole Judge of Appeals in the House of Lords. Hansard, vol. 56 (3d Series), 194; 1841.

for the interference of lay Peers in appeals never would be tolerated in these days unless they had previously attended to the arguments, and the subject of the appeal was one which could be understood by a layman, or the object was to support the opinions of the Judges, to which, as Hale said, great weight should always be given. In several modern cases a lay Peer, who had attended to the argument and taken an interest in it, has been referred to by the Lord Chancellor, and his difficulties have been cleared up. This review of the cases also proves that the law Lords, where their own opinions run counter to the opinions of the Judges or the law, as settled by the courts of law, have not hesitated to act upon their own views. The Reports of the Lords' Cases abound with declarations by the law Lords that the House, that is, that they the law Lords are not bound by the opinions of the Judges as delivered to the House, which is no doubt true, but the constant repetition of this statement shows how sensitive the law Lords are of their supreme jurisdiction. It is not denied that the law Lords are bound to declare their opinions according to their belief of what the law is. Yet the law is never, to my mind, so satisfactorily administered by the Lords as when they act upon the opinion of the Judges. In one case of great interest (*y*), where the Judges in the Court of King's Bench in Ireland were equally divided in opinion, the six law Lords in the House of Lords divided upon the question, although the Judges here gave an unanimous opinion in favour of the judgment as it was entered. Lord Brougham, Lord Denman, C. J., and Lord Campbell differed from the Judges, whilst Lord Lyndhurst, C., Lord Abinger, C. B., and Lord Cottenham, agreed with them. The law Lords alone voted, and two having been appointed tellers, the number of votes was of course equal, two for reversing and two for affirming; and so, according to the general rule, the

(*y*) The Queen v. Millis, 10 Cla. & Fin. 534; see 11 Cla. & Fin. 322, 327, 387, 388, 389, 390, 420, 421, 423, 424.

judgment was affirmed. After this decision the law was altered by Act of Parliament, which is the right way to correct an established rule of law that works ill (*z*). In some cases the Judges have perhaps detracted from the weight justly due to their authority by differing upon trifling points, and delivering their opinions *seriatim*, a practice which leaves the decision properly enough in the hands of the law Lords. Where there is a real difference of opinion amongst the Judges, upon important points they are of course bound to declare it; but it is seldom that Judges cannot agree in their respective courts upon the cases before them, and it is highly desirable that they should, by consultation, endeavour to reconcile their opinions so as to enable them to advise the House with the authority which an unanimous opinion can never fail to carry (I). It is

(*z*) 7 & 8 Vict. c. 81.

(I) This has long been the opinion of the writer, but a contrary view has been taken by great authorities. In the case of The Queen *v.* Millis, before referred to, in which the validity of a marriage by a Presbyterian minister in his own house, of a member of the Established Church with a woman who was not a Roman-catholic, but the jury did not find whether she was a member of the Established Church or a Protestant Dissenter, was disputed, Tindal, C. J., delivered the unanimous opinion of the Judges against the validity of the marriage, supported by an elaborate argument; but he stated, as is not unusual, that his brethren were not to be held responsible for the reasoning upon which he had endeavoured to establish the validity of that opinion. Lord Brougham, who differed in opinion from the Judges, said he must be allowed to say how deeply he lamented the peculiar form in which the assistance of the learned Judges had been tendered to them. The opinion purported to be unanimous; but the more important matter of the reasons urged to support it would not seem to be thus represented. And although in ordinary circumstances this would be of little moment, in the present case there was a fact stated which gave it great importance indeed. Affirming the difficulty of the subject, confessing "that it is involved in still deeper obscurity now than in former times," when one great authority declared that the law lay very loose regarding "things naturally essential to marriage, and others expressed themselves with absolute certainty upon it," the learned Judges "acknowledged themselves unable to trace or define with absolute certainty the boundary of marriage itself," that is, the whole matter in dispute. Nor was this all. They were told that some of those learned persons, how many they were not told, at one time "felt

of course desirable that the reasons should, as far as may be, have the sanction of them all; but it has not been usual for the Judges to deliver their opinions *seriatim* when they agree, and it is hardly desirable that they should do so.

20. The question whether the law Lords alone should vote upon writs of error and appeals appears to have been set at rest, as a general rule, by the case of The Queen *v.* O'Connell. Upon writs of error to the House of Lords against the judgment in Ireland, seven of the nine Judges

considerable fluctuation and doubt," after the argument at the bar, and only "acceded to the opinion of the majority," upon grounds which were not given with a convenient or indeed with any certainty; for it was distinctly stated, that the Chief Justice alone was to be understood as giving the reasons for an opinion in which all concurred, but concurred upon various grounds, some of which alone it was probable were laid before the House, nay, none of which might very possibly be given. 10 Cla. & Fi. 699, 700. Lord Campbell concurred in this opinion, but he also opposed the opinion of the Judges. He observed, that when the Lords availed themselves of their privilege of consulting the Judges on any question of law which they had to consider, they generally had the advantage of knowing the reasons by which the Judges were swayed, for they either delivered their opinions *seriatim*, each expressing his own reasons, or the Judge highest in rank, who delivers their unanimous opinion, expressed reasons in which they all had concurred (?) On this occasion the reasons were the reasons of the Chief Justice alone, and they were left entirely in the dark as to the process by which the others arrived at the conclusion that the first marriage was void. In the Courts below, upon questions of great magnitude, it had not been unusual for the different Judges to give their opinions with their reasons separately, even when they agreed in the judgment: he thought that the Lords would not have the full benefit of consulting the Judges, unless they delivered their opinions separately, or were understood to concur in the reasons assigned by the Judge who delivered their unanimous opinion. It was possible that for the same opinion contradictory reasons might be given, and that the weight to be ascribed to it might be much lessened by those who joined in it combating and overthrowing the arguments of each other. In the present case they had particularly to lament that they were informed of the reasoning of only one Judge, as he stated that "it was only after considerable fluctuation and doubt" in the minds of some of his brethren that they had acceded to the opinion which was formed by the majority. He (Lord Campbell) should have been much gratified and edified by being informed of the course of this fluctuation, what the doubts were which weighed in the minds of those learned persons, and by what train of reasoning those doubts were dispelled. 10 Cla. & Fin. 747, 748.

who were called to the assistance of the House were of opinion in favour of the judgment; and although the remaining two were against the judgment, yet they were surprised to find the point upon which their opinion turned called in question, so universal had been the opinion of the profession on the point. Lord Lyndhurst, C., (who concurred with the majority of the Judges,) moved the affirmance of the judgment. He earnestly advised the House to recognise and adopt the opinion of the Judges. On a question of this nature, a point of technical law, with which they were every day and every hour conversant, when they found a great majority of those learned persons, with that eminent lawyer the Lord C. J. of the Common Pleas at their head, pronouncing a distinct opinion, nothing but a case free from all doubt, a conviction amounting to a certainty, could (might he venture to say it) justify their Lordships in rejecting such authority. Lord Brougham concurred with Lord Lyndhurst, but Lords Denman, Cottenham, and Campbell were of opinion against the judgment. The latter learned Lord observed in conclusion, that, notwithstanding some observations of Lord Lyndhurst and Lord Brougham leading to an entire abandonment of the judicial functions of the House, and a denial to the subject of the relief which the constitution had provided in cases of erroneous judgments in the courts below,—he need hardly press upon their Lordships that they were not bound by the opinion of the majority of the Judges whom they thought fit to consult, although the opinion was entitled to the highest possible respect. The appeal was, not from the Irish Judges to the English Judges, *but to that Chamber of the Imperial Parliament* which he hoped would long continue satisfactorily to administer justice in the last resort to all the inhabitants of the United Kingdom. The Lord Chancellor twice put the question, whether the judgment below should be reversed, and twice it was answered by Lords Cottenham, Campbell, and Denman saying "Content," and by Lord Brougham and

one or two other Peers saying "Not content," but the Lord Chancellor made no declaration of what he considered to be the opinion of the House. At this stage Lord Wharncliffe, who managed the general business of the House for the Government, suggested that they should not divide the House upon a question of this kind, when the opinions of the [law] Lords had been already given upon it and the majority was in favour of reversing the judgment. *In point of fact, they constituted the Court of Appeal,* and if departing from what the practice had ever been (I), noble Lords unlearned in the law should interfere to decide such questions by their votes instead of leaving them to the decision of the law Lords, he very much feared that the authority of the House as a court of justice would be very greatly lessened throughout the country. It was better to concur in the opinion of the law Lords, than reverse the judgments of those persons who by their education and station must be best able to decide upon subjects of this nature, and who in reality constituted the court of law in that House. Lord Brougham perfectly agreed in these opinions, although he thought that their decision would go forth without authority and come back without respect. Lord Campbell observed, that with reference to the distinction between law Lords and lay Lords, and to what had been said as to leaving the decision of this case with the law Lords, it was unnecessary for him to say more than that such a distinction was one which was not known to the constitution; but, nevertheless, he thought that no Judge ought ever to decide a case all the arguments in which he had not heard, and of which he could therefore know comparatively nothing. He believed that none but the law Lords had attended to the arguments in this case; it would therefore, he thought, be proper that noble Lords who had not heard the debate should abstain from voting. The Lord Chancellor thought that they who had not heard

(I) This, of course, was a mistake.

the arguments would decline voting if he put the question again. One lay Peer said that *he had considered the subject most attentively, and he was desirous of giving an opinion with respect to it.* Another lay Lord said that if any Lord not learned in the law, who had not heard the whole argument, voted in addition to the law Lords, he should, as a matter of privilege, think it his duty also to give his vote. All the lay Lords at length withdrew, and the judgment was then reversed (*a*).

21. Lord Lyndhurst appears to have been fully justified in the advice which he addressed to the House not lightly to overrule the opinion of the great majority of the Judges, which agreed with the judgment of the court below. It was represented that to follow this advice would lead to an entire abandonment of the judicial functions of the House. The appeal, it was said was not from the Irish Judges to the English Judges, but to this Chamber of the Imperial Parliament. Hale, as we have seen, thought that the safeguard of the subject was, in the opinion of the Judges, whose opinion, he said, had been held so sacred that the Lords had ever conformed their judgments thereto, except in cases like that of ship-money (*b*). Now let us consider the mode in which the judgment of the King's Bench in Ireland was reversed. There was first the decision of that court which was the subject in dispute, but this was supported by seven out of nine of the English Judges, and the other two Judges were taken by surprise when the objection was first urged. The Lord Chancellor, who, although he has no more power in appeals than any other Peer, yet is the head of the law, and usually directs the opinion of the House, agreed with the seven Judges and Lord Brougham, also concurred. On the other hand, Lord Denman, Lord Cottenham, and Lord Campbell, agreed with the minority of the Judges. The judgment, therefore, was reversed in the Lords upon the single opinion of one of the three last-

(*a*) 11 Cla. & Fin. 155. (*b*) Hale's H. of Lords, 159.

named Lords. Take any two and set them off against the Lord Chancellor Lyndhurst and Lord Brougham, and the third is the person upon whose vote the solemn judgment of the Court of King's Bench in Ireland, supported by seven of the English Judges and by the universal practice up to that time, was overruled; so that in every other court of justice the judgment would have been supported. This is not a desirable state of things; it is not the way in which the country would long rest content with the administration of justice in the ultimate Court of Appeal. I venture to express this opinion solely in regard to the great weight of authority, without reference to the merits of the question, which I purposely abstain from commenting on. If political considerations could ever be allowed to prevail in a judicial decision, the lay Lords were well advised in the particular case to abstain from voting. Apart from such considerations, the policy, nay, the propriety of their withdrawing without voting, may be open to doubt. It is, of course, the duty of every Peer to hear all the arguments before he decides, but in a case depending upon technical rules lay Lords would hardly be enlightened by the arguments, so that at last it would appear that the House is not the proper place for the hearing of appeals. But the Lords are entitled to require the Judges to give them their opinions, which opinions are to instruct and guide them, although they are not binding on them. The Judges have no voice in the decision of the question. Now the law Lords can both advise the House and vote in favour of their own views; but their opinions are no more binding on the House than the opinions of the learned Judges. When, therefore, as in the case under consideration, the great majority of the Judges agree in support of the decision in the court below, and the law Lords are divided in opinion—the majority, three to two, being for reversing the judgment, and the minority includes the Lord Chancellor,—the lay Peers may fairly step in to the relief and support of the law, and decide,

not according to their own opinions of the law, but upon the law as laid down by the court below and by the great majority of the Judges called in to their assistance, and supported by the Lord Chancellor and another law Lord, although opposed by three other law Lords. The opinions of the law Lords ought to guide the House only, because they are the opinions of persons learned in the law; but when they are opposed to an actual decision by persons equally learned in that science, supported by seven Judges out of nine, and by the Lord Chancellor, they cease to carry the weight which might, under other circumstances, attach to them. It is of the deepest importance to the well working of the constitution that the opinions of the Judges should have more regard paid to them. It is not satisfactory that the opinion of a great majority of the Judges should be overruled by one person, although that person be a law Lord.

22. As the House of Lords has now virtually delegated its power as a court of appeal to the law Lords, it becomes important to consider of whom this body consists, and by what rules it is bound. The Lord Chancellor, although voting as a Peer, is invested with the highest judicial duties, and sits in his costume as a Judge, and carries with him all the judicial habits of Westminster Hall; not so the other law Lords; they are men who have filled high judicial offices, or who hold high judicial office, *e. g.*, the Chief Justice of the King's Bench, where he is a Peer. Now none of these Peers assumes any judicial costume, but they sit in the House undistinguished from the other Peers. This is not a trifling point; for if a man is sitting as a Judge, in the dress of one, he is necessarily confined to the duty which he undertakes; he cannot with propriety engage in general conversation with those around him; he cannot listen to part of an argument and then leave the House for a time, and read a note of the remaining portion of the argument. If therefore the appeal business is virtually to

be left to the law Lords, and the voice of the Lord Chancellor, who is bound to give a strictly judicial attention to the case, is to be overruled by any two of the law Lords not in office, it seems desirable that they should, in assuming the attributes of Judges submit to such forms and duties as would satisfy the suitor that they do effectually fulfil the conditions of Judges (I). In a case of great interest, a late learned Lord observed that he listened for four days to the speech of one counsel against the judgment under appeal; he made notes and looked attentively into all the papers to which that counsel thought proper to refer, and he confessed after having done that he retired from the House feeling that he had neither health nor patience to bear it any longer, and perfectly satisfied that what the learned counsel could not do in four days could never be accomplished. He was therefore perfectly satisfied in his mind that the judgment given by his noble and learned friend could not be shaken. He did not hear the counsel for the respondents, but he had since heard three noble and learned Lords address the House against that judgment. His mind continued still unchanged. The reporters state, in a note, that the four days of argument which the law Lord to whom I have referred heard, were the four first days of the argu-

(I) The writer expressed the same opinions in the House of Commons in 1841. He said he could assure the House that, as far as his own opinion was concerned, founded upon experience, he thought that nothing was so dangerous to the interests of justice as that persons sitting in the House of Lords in their capacity as Peers, in their ordinary garb, divested of all the responsibilities of legal functionaries, should interfere actively in the decision of appeals. A person so circumstanced could never be considered to act under any responsibility as to the mode in which he exercised this most important office. He was not like a regular Judge, clothed in all the authority of his office: it was not an act of duty that such persons performed, for no such duty was imposed upon them; and there was nothing he so much objected to as such a mode of deciding an appeal, although there would probably be no man whom he would be more desirous to accept as Judge in his suit, if the same individual were to pronounce his decision in the regular exercise of his functions. Hansard, vol. 56 (3d Series), 195.

ment, in 1835. The argument at the bar of the Lords in 1835 and 1838 occupied 46 days (*c*). Now a Judge in a court of law would not venture to absent himself from the greater part of the argument, and yet deliver judgment; nor could any law Lord in the House of Lords so act if the law Lords regularly assumed the duties as well as the functions of Judges. A question of some interest is, who is a law Lord? When a man has filled a high judicial office no difficulty can arise as to his answering the description; but it seems desirable that in other cases, although a Peer of Parliament may have been a practising lawyer, his right to act as a law Lord should in some manner be recognised by the House. But you can never exact the due performance of such a duty as deciding upon appeals according to judicial form, unless you purchase the right. The law Lords are generally in office, or have a pension on quitting office; and I would therefore propose, whilst the appeals are left to the decision of the law Lords, something like a retaining fee to the latter, for example 1,000*l.* a year, in addition to their retiring salary. This would not be too much for the important duty to be performed. There is no reason why they should not be remunerated as well as the noble Chairman of Committees. Lord Eldon suggested that the pension of ex-Chancellors should be made dependent on their acting as law Lords on appeals, but of course this could only be whilst they were competent to do so.

23. We have now several law Lords, but it may happen, as it frequently has happened, that the Lord Chancellor may be the only law Lord in the House, or the only one attending to appeals; in which case he is the sole judge of appeals. Upon this subject the writer has long since expressed his opinions (*d*). "Was it not," he asked, "a most alarming circumstance that the whole of the appeal business of the empire

(*c*) Small *v.* Attwood, 6 Cla. & Fi. 499. 438. The noble Lord advised the House to direct issues.

(*d*) Hansard, vol. 56 (3d Series), 194.

[from the Courts of Equity] might, by some of the changes to which that high office was constantly liable, be made dependent on the judgment of a person who might be utterly unable to form a judgment upon the different cases, not because he was not endowed with the highest qualities which could adorn such a functionary, but solely because he had been accustomed to direct his attention to a different branch of legal inquiry and practice from that of the equity courts, and therefore his mind was unprepared to enter upon a consideration of such subjects? The House of Lords had the power to call in the common law Judges to obtain their advice in cases of difficulty; but no assistance could be required from the equity Judges unless they were Peers, and as such had a right to be present. All appeals, then, from the Court of Chancery must be appeals to the Lord Chancellor himself. This of itself was a most alarming fact. If a Judge in a court below were called upon to re-hear a cause, instead of that cause being carried to another tribunal, he might change his opinion without any impeachment of his judgment, but in a case of appeal to a superior court of which he was the Judge, unless it were the case of some obvious slip, it would be contrary to human nature to expect that he should reverse his own decision. His authority being impugned before his peers, he had every motive and every feeling to affirm his own decision; he was, in fact, to all intents and purposes, a party in the cause. If a Judge had a pecuniary interest in a cause he was not permitted to sit in judgment on it; and whilst character and high station were of value—whilst self-love was an actuating motive in the human breast, the Lord Chancellor, sitting as the Judge of appeal in the House of Lords, would have a much stronger motive than any pecuniary interest could possibly afford to affirm his own decision. The ancient Grecian appealed from Philip drunk to Philip sober, but appeals from the Court of Chancery to the House of Lords were appeals from Philip sober to Philip drunk,—appeals from a Judge uninfluenced by any

motive, with all his passions slumbering, to the same Judge actuated by the strongest possible motives, the passion of self-love, to support his own previous judgment. Such a system could not long be allowed to continue, and he knew that no one deprecated it more than the present Lord Chancellor himself. The general feeling of the country with reference to the system now in force was such that it could not continue much longer, but must inevitably be reformed; and so strongly was the necessity for this reform felt, that no professional man would conscientiously recommend an appeal to the House of Lords from the Lord Chancellor's decision if it appeared probable that the same individual would preside in the House of Lords upon the appeal. Such a mode of hearing appeals, in his opinion, amounted to a denial of justice." These observations, as reported, are, perhaps, hardly sufficiently guarded or qualified. Every Judge when he pronounces his judgment, of course believes that he has decided rightly; his first impression, therefore, when his judgment is impeached, probably is to support his former view, because he believes it to be correct. If he were convinced it was erroneous he would, no doubt, be willing himself to correct the error, but the position in which a Chancellor is placed in deciding in the Lords upon an appeal from his own judgment is such, that although it will not be doubted that wrong judgments have been pronounced, yet I remember no instance of the Chancellor's advising the House to reverse his own judgment. In some instances, the Chancellor finding his opinion at variance with that of another law Lord, has yielded and allowed his judgment to be reversed; but I am referring to cases heard by the Chancellor alone, that is, without the aid or control of any other law Lord; and this seems to show that the bias is too strong to be resisted, although I do not doubt that the Judge is satisfied that he is acting correctly in affirming his own judgment.

24. Where, as in the instance of Lord Keeper Henley, before he was made Lord Chancellor and created a Peer,

the Great Seal is confided to a commoner as Lord Keeper, his position is an anomalous one; he can only put the question from the woolsack (*e*), and cannot speak. Henley had to move the reversal of a few of his own judgments, upon the opinions of Lord Hardwicke and Lord Mansfield, without having the power to offer any reason to the House in defence of them (*f*). At that period, therefore, there was no acknowledged head of the law in the House of Lords responsible for the decisions there. The same evil exists when the Great Seal is put in commission (I). There are few men of property upon whose most important interests courts of equity do not at some time adjudicate. Every man, therefore, looks with an anxious eye to the manner in which the judicial duties are provided for. The important duties assigned to a judge sitting in appeal point to the necessity of appointing to the office not merely a competent person, but one in whom the bar has confidence; for if the judge has not the confidence of the bar, he will not acquire that of the suitors. The law, as he propounds it, should be the rule for all. The great object of an appellate jurisdiction is at once to satisfy the justice of the individual case, and to keep the precedents uniform, and afford a standard for the inferior jurisdictions, and a sure guide for the practising lawyer. Whilst the law is unsteadily administered, no man at the bar cares to give a decided opinion, because he cannot depend upon the judge, and he justifies himself to the solicitors and the clients on that ground. Everything upon

(*e*) See 31 Hen. 8, c. 10, s. 8.

(*f*) See Lord Henley's Memoir of L. C. Northington, p. 36.

(1) This happened in 1835. The writer, in a public letter addressed to Lord Melbourne, as the head of the administration, observed that it might not be desirable to describe as strongly as he felt the serious evils which had resulted from this mode of administering the appellate jurisdiction, but he could venture to assure his Lordship that there was a general, and he must say a well-founded dissatisfaction with the arrangements which he had made for the administration of the law in the Court of Chancery and in the House of Lords.

which any possible doubt can be raised is thus forced into court, and the very means adopted to insure safety in the particular case increases the general mischief, until the law, instead of a blessing, becomes a curse to the people. To the first judge of appeal in this country is assigned the highest station, in order to give to his decisions all the weight which power and dignity can add to their intrinsic merit; it is the homage which the state pays to the law. Such a judge may properly take all the aid he can acquire upon particular cases, but the law will not be satisfactorily administered unless his own opinion be the most honoured, and that he act upon it so as to preserve one uniform rule. *Fixation in matters of law* above all things tends to prevent litigation, and to make a people contented. Now this requires a singleness of mind and purpose, a unity which is not to be hoped for when the Great Seal is put into commission. No court of appeal will act to the satisfaction of reasonable men unless it is composed, as long as circumstances will permit, of the same persons whose express duty it is to hear the appeals, and who are responsible for the decisions, nor unless they are presided over by an accomplished lawyer, to whom the profession and the suitors may look up with confidence (I).

25. This leads me to the consideration of the question, Has the House of Lords satisfactorily performed its functions as the ultimate Court of Appeal? Undoubtedly much is required from it—Fixation of law: general rules not simply binding in law and the guides which Judges are bound to follow (*g*), but well founded in law and carrying with them the opinions of the great lawyers of the day, and satisfying succeeding generations. When any great point of law is agitated, the question should always be, What rule

(*g*) See 6 Ves. Jun. 547.

(I) These observations are extracted from the letter to Lord Melbourne in 1835, before referred to.

has been established by the House of Lords? If a Court of Appeal is to lay down imperative rules for other Courts, its decisions ought to be uniform: it will not be tolerated that this Court should seek to bind the judges of the land by uncertain varying decisions from which no certain principle can be collected. The constitution of the House of Lords as a Court of Appeal, is, as we have seen, not such as is likely to lead to the desired results. Let us practically examine the working of the system. It cannot be said that there is greater certainty in the decisions of the Lords than in those of any of the Courts below. It is rarely that any great principles of law are enunciated there; that any clear fixed rule is laid down as a guide for the other Courts, and by which the Court of Appeal professes to bind itself. The Lords who decide not unfrequently disagree, and they probably never meet as Judges of this great Court of Appeal and agree upon one uniform judgment, clearly expressing the grounds of the decision. Up to this moment, it is difficult to collect the decisions of the Lords on any given point, and it is manifest that they have sometimes been unaware of their own previous decisions; their cases are mixed up with and lost in the current of the law, and have frequently been lost sight of or disregarded in the Courts below, where the principle ran counter to the opinions of the profession, and the cases were not precisely the same (1): there is no authority which hitherto has so slowly

(1) In Andrew *v.* Wrigley, 4 Bro. C. C. 137, the Master of the Rolls, in discussing the case of Savage *v.* Humble, said, if these were the grounds on which the House of Lords decided, he must dissent from their judgment. There was no lawyer at that time in the House (unless, perhaps, Lord Somers), and the case was much embarrassed by circumstances. Lord Eldon, C., observed in the House of Lords, in a case from Scotland, that although every Court may say, that if a case varies in facts and circumstances, it is at liberty to found upon these different circumstances, he did not recollect that it ever fell from a judge in this country that he would obey the judgment of the House in the particular case, but not follow it in others. That was not a doctrine to which they were accustomed, 6 Dow. 112.

In Hills *v.* Downton, 5 Ves., before Lord Rosslyn, where the question arose as

found its way into the body of the law as the decisions of the House of Lords: this has been owing to many causes: for a long period there were no reports of their cases, and it was seldom that the grounds of a decision could be collected from the accumulation of facts in the printed cases: judgment was often long delayed, so that the very counsel in the cause forgot the exact points at issue, and knew not the force of the decision as a rule of law: when reporters first began to attend the House their reports were not satisfactory; they were frequently compiled from the printed cases and short-hand writers' notes, with but little attendance on the argument of the case. For a few years, from 1821 to 1826, there were no reports, and indeed the learned reporter stated on renewing his labours that he published

to supplying a surrender for a grandchild, he observed that he had no difficulty in saying he thought of that determination of the House of Lords as Lord Harcourt and other lawyers had done. Upon the Journals of the House of Lords it appeared no one was present upon that occasion who could know much of the matter; it was not determined by lawyers, and Lord Harcourt spoke of it certainly as not such a decision as he would follow, and one or two other Judges had not treated it with much respect. In a case in 1702 (Watts *v.* Bullas, 1 P. Wms. 61) the Master of the Rolls, sitting with the Lord Keeper, said, with reference to the decision in the Lords, that it was his opinion such a devise of a copyhold, without a surrender, ought to be made good for grandchildren as well as children, "and if the same case were to come *now* into the House of Lords, it would be so ruled," *and that he had and would decree it so.* And *the like*, the reporter informs us, was declared by Lord Harcourt in 1712. But in Perry *v.* Whitehead, 6 Ves. 544, where the precise question arose, Lord Eldon stopped the counsel who was to support the rule, and said he felt great difficulty in hearing the case. The question with him, *adopting all the sentiments of the great persons named, as far as they go*, with due submission to that Court, which had a right to bind him and them, was whether he could set up his judgment against a judgment of the House of Lords. A rule of law laid down by the House of Lords could not be reversed by the Chancellor, though if there was any difference, from a circumstance that was not before the House of Lords, the cause might be decided upon that. The rule of law, he added, must remain till altered by the House of Lords. Best, C. J., in delivering his opinion to the House of Lords in a case before the Lords, observed, that although the Courts below would not impugn their Lordships' judgment in cases *ad idem*, yet they did not hold that they were bound by them beyond the point actually decided, 3 Bing. 569.

them at his own personal risk of loss (*h*), from which it may be collected that no bookseller would incur the risk of the publication. The writer argued most of the leading cases on property law during that period, and he preserved his printed cases and notes, but he may confidently assert that important as many of those cases were, during the whole of his remaining career at the bar, they were almost unknown to the profession and not quoted in our Courts. Some of the leading cases decided by the Lords have been from various causes misunderstood even by text writers of reputation; and in a few instances the decision of the Lords has been wholly overlooked. These evils are likely to be overcome in a considerable degree by the establishment of regular reporters by the House of Lords, and the present collection and review of the cases will at least enable every one at once to see what the House has in modern times previously decided upon any given point. It is highly desirable that the decisions in the Courts below, when the question turns upon an important rule of law, should not be reversed without the opinion of the Judges; and it would add greatly to the weight of the decision if the law Lords would, when they agree, pronounce one judgment through the Lord Chancellor as their mouth-piece. Nothing is more dangerous to the law, as a science, than a *debate* in the Lords on a rule of law.

26. The House of Lords must always afford an excellent place as a court of justice. If the audience is not large, yet the court is open to all, and the importance of the place, the distance of the counsel from the judge, if I may so call him, and the power which all the Lords have of attending, afford an opportunity of being heard to advantage, which no other place could give. But then not only should the Lord Chancellor have regularly other and great assistance in the House in hearing appeals, but the forms of a court of justice should be more strictly adhered to. Noble Lords

(*h*) Preface to 1 Bligh, N. S.

should not feel themselves at liberty to occupy the attention of the Lord Chancellor with any other subject during the hearing, and above all the Lord Chancellor should give to the argument his undivided attention (I). Nothing discourages a counsel so much as the inattention of a judge; it has a tendency to render him indifferent to his argument, for it is very distressing when one of great labour is thrown away, and if he persevere it leads to repetition, which in its turn disgusts the judge, and the Court and the bar become mutually dissatisfied with each other. If a judge give, as he ought to do, his undivided attention to the argument, he encourages the diligent and stimulates the indolent, and he can always interpose with propriety when a counsel is rambling or repeating his argument. The great object of counsel must be to impress the judge with his view of the case; he always desires to succeed: when he is satisfied that the judge comprehends him his purpose is answered. The assistance which would be given to the House of Lords in a well regulated court of appeal would at once impress upon it the forms of a court of justice, and as the highest, from which there is no appeal, it would feel bound to give its attention wholly to the cause, and would be able readily to keep counsel to the points really in dispute. It is not often possible to satisfy the losing side, but if the judge is incompetent, or inattentive, the counsel who fails is sure to complain, his dissatisfaction quickly communicates itself to his client, the suitor, who has not the consolation which an attentive hearing and a well-considered judgment would afford to him. Thus men's minds are soured, and they become, not without reason, discontented with the best institutions of the country (*i*).

27. An *effective* court of appeal is a necessity; it can no

(*i*) Letter to Lord Melbourne, 1835, before quoted.

(I) It is desirable that the table should be so arranged that the clerks should not sit between the Chancellor and the bar: the Judge and the Bar should have an uninterrupted view of each other.

longer be dispensed with. This was said in 1833 (*k*), and I venture now to repeat it. I shall conclude these observations by a statement of the various plans which have been proposed or mentioned in Parliament in late times for improving the appellate jurisdiction. It may save some trouble to those by whom the task which remains to be performed may ultimately be accomplished.

28. In the year 1830, the writer, with a view to impose a check upon improper appeals, suggested a court to be called a Court of Equity Exchequer, to be composed of the Lord Chancellor, a new Judge to be appointed, the Vice-Chancellor, and the Lord Chief Baron. The court being thus constituted, he would give the appellants the option to go before three of these Judges who had not before heard the cause, before the Lord Chancellor and two of the other Judges, or before the other three Judges, or go to the House of Lords (l). If this plan were adopted, he was satisfied that it would stifle nine-tenths of the appeals which were then preferred, more particularly if the moral responsibility of the counsel should be well established. Another part of the general plan he said ought to be, that the Lord Chancellor should have the power to call one of the equity Judges to his assistance in cases of appeal in the House of Lords. He meant that that Judge should sit with him, and not over him, for it was obviously inconsistent with the station which the Lord Chancellor held, and ought to hold, that he should have any Judge over him. He ought not to be under the control of any Judge. The object was to pro-

(*k*) The same letter.

(l) Lord Langdale observed in 1836, that the idea of such a court of intermediate appeal was taken from the Court of Exchequer Chamber; but upon the best consideration which he had been able to give to the subject, it did not appear to him that this plan could have succeeded. Whilst three Judges were occupied in hearing appeals, one only could have been left to hear original causes, and such an impediment would have greatly increased the obstruction. 34 Hansard (3d Series), 464.

vide that the appeal should not be to the same Judge only, for an appeal to the same judge was little else than a mockery (*l*).

29. In 1833 Lord Brougham, C. laid on the table of the House of Lords a bill for appointing a chief judge in Chancery, and for establishing a court of appeal in Chancery; the new judge to be, in effect, Lord Chancellor in that court; the new court to be an equity exchequer chamber, consisting of the Lord Chancellor, the new Judge, the Vice-Chancellor, and the Chief Baron of the Exchequer, with a limited right of appeal to the House of Lords. The Lord Chancellor's political functions and the appellate jurisdiction of the House were reserved; but this bill was dropped (I).

30. In 1834 the plan proposed by Lord Melbourne's government had these leading provisions: 1. All appeals which the House of Lords should direct, were to be heard by the Judicial Committee of the Privy Council, who were to report to the House, and the Lords were to be at liberty either to affirm or not the report, and either with or without any hearing of the case, but no parties in any proceeding before the Judicial Committee were to be at liberty to apply for a rehearing before the House of Lords. 2. The Lord Chancellor or Lord Keeper of Ireland, *being a Privy Councillor of England*, and any person who should have held either of such offices, was to be one of the Judicial Committee (*m*). 3. The Crown was to have the power to appoint a vice-president of the Privy Council to hold office during his Majesty's pleasure, but his Majesty was to be bound to select such vice-president from *Peers* who should have held the office of Lord Chancellor of Great Britain, or of Lord Chan-

(*l*) Hansard, vol. 1 (3d Series), 1277, 1278.

(*m*) But see the provision of the 3 & 4 Will. 4, c. 41, s. 1.

(I) See Lord Lyndhurst's account of it in 1836. 34 Hansard (3d Series), 435, 436. Lord Langdale observed in 1836 that the proposed intermediate court of appeal was evidently framed on the model of Sir Edward Sugden's plan, and was liable to the like objections.

cellor of Ireland, or of Lord Chief Justice of the King's Bench of England; and the Judicial Committee were to have the powers given by the 3d & 4th of Will. 4. And 4. Power was proposed to be given to the Committee to require the attendance of the Judges of the King's Bench, Common Pleas, or Exchequer of England, or the Court of Session in Scotland, not being members of the Privy Council. 5. No appeal was to be heard unless in the presence of the Lord Chancellor of Great Britain, or of the Vice-President of the Privy Council, or of the Chief Justice of the King's Bench, or of the Lord Chancellor of Ireland.

31. The writer thought this plan open to considerable objections. It virtually displaced the House of Lords as an appellate jurisdiction; it reserved to the House the right to affirm or not any report, and either with or without any hearing of the case. How, he asked, was this irresponsible power to be exercised? By whom? Suppose the Lord Chancellor to preside at the Judicial Committee, and to be overborne by the opinions there, would he be at liberty in the House to move the non-affirmance of the report without any hearing of the case? Suppose he did not preside at the hearing of the Judicial Committee, was he, with such lights as a private inspection of the papers might afford to him, to move the non-affirmance without a hearing? But how were we to know that *anybody* would take the trouble to read the papers? for it was a duty which would not properly devolve on any one. Besides, a private perusal of papers which was not to be followed up by any public explanation of the reader's views, was too frail a security for the people's rights. It might open the door to abuse, but it was not probable that it would tend to any substantial good. He hoped never to see such a course adopted. The only object of the appointment of a Vice-President of the Privy Council was as one of the highest Judges of the land, and he ought not therefore to hold his office during pleasure. This would be reviving in its worst shape what was long

felt as one of the most serious grievances under which the nation laboured, the dependence of the Judges upon the Crown. It was an evil to which we submitted in the case of the Lord Chancellor on account of his political character, but it ought not to be extended. If the political character of the Lord Chancellor were the ground upon which the office was to be severed, because it was not safe to entrust the disposition of our properties to a single Judge who is dependent on the Crown for his continuance in office, that objection would operate more forcibly when he was a political character and Minister of State placed at the head of the law without any of those ties remaining which bind a man to his profession, and render him amenable daily to its observation, and if need be to its censure. The writer also thought the Judicial Committee not the proper tribunal for the final hearing of the great real property and equity causes of the empire, and he thought it would be singular if the Privy Council were in these times of general reform to be made the court of appeal in cases of property generally, referring to Blackstone's observation, that the 16 Car. 1, c. 10, s. 5, in abolishing the Star Chamber, took effectual care to remove all judicial power out of the hands of the King's Privy Council (*n*).

32. In 1835 it was generally understood that the Government were devising some plan for separating the office of Lord Chancellor, and having a political Lord Chancellor and a chief Judge in equity. This led the writer to observe (*o*), that if any plan was devised which would withdraw the head of the law from the House of Lords, or place a mere political person at the head of it, he hoped it would be defeated. The law in the person of the Chancellor gave to the State all the weight which great legal acquirements and practical knowledge could impart; the State in return shed

(*n*) Sugden's Letter to Lord Melbourne, 1835, 21–27. See Lord Lyndhurst's opinion of this measure in 1836, 34 Hansard (3d Series), 436.

(*o*) Letter to Lord Melbourne, p. 11–17.

a lustre over the administration of the law in the dignity and station with which it invested the chief magistrate. The chief Judge would not be the head of the law. Then would arise the danger that the office of Lord Chancellor might thereafter be filled more with reference to his political than his legal abilities. One thing was clear, that he would exercise no original jurisdiction, for none would be left for him; and unless he were daily sitting in a court of justice, not simply reviewing the decisions of others, but bringing his own mind and principles to bear originally upon cases as they arise, he would not be competent to decide with advantage on appeals. He would, as it were, be a stranger to the family of the law, under whose roof he ought to dwell. He would find it difficult to gain the respect of the bar, or to win the confidence of the suitors. These objections were independent of those which might be urged against the appointment of a political Lord Chancellor.

33. In the year 1836 Lord Cottenham, C., proposed his plan to the House of Lords; the plan was to appoint a Chief Justice in Chancery, during good behaviour, to hear appeals and original causes; he objected to all appeals going direct to the House of Lords; the Lord Chancellor to hear appeals both in the House of Lords and in the Judicial Committee of the Privy Council. The House was to have power to sit to hear appeals after a prorogation, and also power to call in the equity Judges. To this plan of separating the office of Lord Chancellor, Lord Lyndhurst objected. Lord Langdale, Master of the Rolls, advocated the following plan:—1. The Lord Chancellor was not to hold the Great Seal, but to be created by letters patent, and confined to judicial functions of original jurisdiction in the Court of Chancery. 2. There was to be a Lord Keeper, with the Great Seal and with all the political functions, but without any judicial power. 3. The House of Lords was to be the court of appeal for all, with permanent Judges, consisting of a Lord President and Lords Assistants. 4. The

King was to have power, on the address of the House, to extend the time of sitting to hear appeals, notwithstanding a prorogation or dissolution. 5. It was to take the appellate jurisdiction of the Judicial Committee of the Privy Council. Lord Langdale disapproved of a double appeal: there might be a rehearing before the same Judge, but an appeal to another Judge. The objects to be accomplished were to provide—1. Sufficient original power in the Court of Chancery. 2. Sufficient legal and political power to enable the Government to give adequate attention to the state of the law and the administration of justice. 3. Sufficient legal assistance for the appellate jurisdiction of the House of Lords. The Lord President was to hold his office during good behaviour, and the person thus permanently to preside was to be the most eminent lawyer, uniting in himself learning, integrity, and judicial character. The Lords Assistants were not necessarily to be Peers: they were to be selected from amongst the persons most eminent in the different branches of the law to be administered in the House: they were to hold their offices during good behaviour, and were openly to give their advice before judgment was pronounced (I). The Judges were to attend when required. The Lord Keeper was to be the principal adviser in matters of law, a privy councillor, cabinet minister, and great officer of state, acting ministerially and politically as connected with the Great Seal: he would be the connecting medium between the state and the profession, would nominate magis-

(I) The Lords' Committee on Appeals appointed in 1823, in recommending the appointment of a Speaker to preside in the Lords in the Lord Chancellor's absence, observed that it seemed to be highly expedient that such Speaker, although not a Lord of Parliament, should have liberty to declare his opinion upon the case, and the reasons upon which it was founded, before the question was put as to what the judgment of the House should be, respecting which it might be important to remark, that according to the present Standing Orders of the House of Lords, the Judges, and such of His Majesty's Privy Council as were called by writ to attend, might speak and deliver their opinion, if required and admitted so to do by the House.

trates, and be responsible for the appointment of all judges and judicial officers. His duty would be to conduct and direct inquiries into the state of the law; to prepare and bring forward all Bills introduced with the sanction of Government, and to examine and report upon all Bills brought into Parliament by individual members of either House: to him might be brought back some of the duties which had slipped into the office of the Secretary of State of the Home Department. These duties would require a man of pre-eminent talents and learning, and they would occupy his whole time (*p*).

34. The plan of Lord Langdale, therefore, was to have in effect, 1. A new Judge in Chancery, to be *called* the Lord Chancellor, but who was to have no appellate jurisdiction. The proposed Lord Chief Justice of Lord Cottenham is precisely the same officer, but with an appellate jurisdiction over the Courts of the Master of the Rolls and the Vice-Chancellors. Lord Langdale would have all the appeals go direct to the Lords. Lord Cottenham would restrict the number as much as possible. In the computation which he made of the great number of appeals finally disposed of by the Lord Chancellor, that is, which did not travel to the House of Lords, it does not appear to have struck him that this is mainly owing to the *same Judge* now presiding in the Lords and in the Court of Chancery. If a Chief Justice in Chancery were appointed in the Court of Chancery, according to his plan, whatever might be the merits of the Judge, there would, I apprehend, be a large increase of the number of appeals to the Lords. 2. To return to Lord Langdale's plan—a Court of Appeal always sitting in the House of Lords, with a Lord President and Lords Assistant. 3. A political Lord Chancellor, to be called Lord Keeper. The objections to this plan appear to be, 1, That the new Lord Chancellor would be deprived of his appellate jurisdiction over the Rolls and the Courts of the Vice-Chancellors.

(*p*) 33 Hansard (3d Series), 402. 34 Hansard (3d Series), 413.

It may be open to consideration whether two appeals should in all cases be allowed; but the suitor should be left to his election. 2. The Court of Appeal would have no original jurisdiction. 3. The political Lord Keeper would have no judicial power, and would soon become a political minister. Is he to be removable? If so, no proper man could be obtained to fill the office. If not removable, he would be a drag-chain on the party to which he did not belong. The duties, too, are such as might readily be evaded, or perfunctorily performed. And to this officer, without judicial power, was to be entrusted the appointment of the Judges of the land. Wholly severed from Westminster Hall, how could he make the selection? Both plans appear to be open to serious objections; but that of Lord Cottenham is the simplest, and does the least violence to our settled institutions (I). Lord Cottenham's Bills for carrying his plan into effect were lost on a division: Lord Langdale's plan was not embodied in a Bill.

35. In 1839 Lord Brougham expressed his opinion in favour of separating the judicial functions of the Lord Chancellor from his political ones. Lord Cottenham supported his original views. Lord Lyndhurst had not changed his opinion; and Lord Langdale retained his former opinion,

(I) Mr. Cooper, in a work upon the defects in the administration of justice, published in 1828, proposed that the Lord Chancellor should not continue to sit in the Court of Chancery, and that the House of Lords "should abandon a jurisdiction which they have been incompetent to exercise ever since its first acquisition;" and that a new Court of Appeal should be created for both appeals to the House of Lords and from the colonies. The Lord Chancellor to be the head of the new Court of Appeal, but only to preside upon extraordinary occasions, *e. g.* on occasions similar to those in which in France the Chancellor or Keeper of the Seals presides in the Court of Cassation, as where the appeal has been once heard, and the opinions of the judges have been equally divided, &c. Mr. Lynch, the late Master in Chancery, in a public letter addressed to Lord Melbourne in 1836, advocated Lord Cottenham's plan, with modifications; whilst Mr. Spence, in an Address to the Public in 1839, considered Lord Langdale's plan the best. In 1841, Mr. Burge published Observations on the Appellate Jurisdiction, in which he advocated the appointment of only one supreme Court of Appeal for all appeals at present preferred to the Queen in Council and to the House of Lords.

and considered that a Court of Appeal should always be sitting in the House of Lords, independently of the Equity Judges (*q*).

36. In the early part of 1841 the writer proposed, in the House of Commons, a plan for improving the appellate jurisdiction. He moved certain resolutions, and embodied his scheme in a Bill, both of which were read a second time, but without any expectation that they would pass into a law (*r*). They will be found in the Appendix. The objects aimed at were, to abolish the Court of Review in bankruptcy, which has since been accomplished, and to abolish the Judicial Committee of the Privy Council, and to remodel the Court; and to add to the Court of Appeal in the House of Lords two Judges, to be appointed during good behaviour, and, as proposed by Lord Langdale, to be called Lords President, but not necessarily to be Peers, and that these Lords President should act as Judges with the Lord Chancellor during the hearing, and openly deliver their judgments, but not to have voices if not Peers. The House, when the arrear of appeals might render it necessary, to sit to hear appeals notwithstanding a prorogation, and also to have the power of summoning the Equity Judges upon the hearing of appeals. It was proposed that the appeals in the House of Lords should be heard with as many of the forms and regulations of the superior Courts of Justice as were consistent with the jurisdiction and authority of the House. It was further proposed that the two Lords President should sit and hear the matters then referred to the Judicial Committee of the Privy Council, with power to call to their aid any other judge except the Lord Chancellor, and that the Lord Chancellor might attend upon their request, if he should think proper; and that if the two Lords President should sit alone, but could not agree, the case should be adjourned for the assistance of the Lord Chancellor, by whom, and the two Lords President, the case should be disposed of.

(*q*) 48 Hansard (3d Series), 40.

(*r*) See 56 Hansard (3d Series), 186–200.

CHAPTER I.

OF CONTRACTS, DEEDS, AND SETTLEMENTS.

SECTION I.

OF CONTRACTS (*a*).

1. *Where in a marriage contract an intention expressed amounts to an agreement.*
2. *Where a memorandum is a sufficient agreement within the statute.*
3. *Bond on marriage to secure sums agreed upon, held an agreement, beyond the penalty.*
4. *Want of mutuality.*
5. *Family arrangement: consideration.*
6. *Attorney and client: improvident contract.*
7. *Surprise: improvident bargain.*
8. *Fraud: undue influence: intoxication: confirmation.*
9. *Heir apparent: sale by a tradesman a cover for a loan: King v. Hamlet.*
10. *Observations on that case.*
11. *The decree affirmed in D. P., with observations.*
12. *Sale by heir of post obits at value, valid.*
13. *Callaghan v. Callaghan: agreement to grant a qualification for Parliament not enforced: consideration between brothers: uncertainty in terms.*
14. *Remedy on contract made abroad.*
15. *Misconduct of arbitrators in fixing rent.*
16. *Agreement between claimants out of possession: champerty: stat. of Hen. 8.*

1. IN Hammersley *v.* Baron de Biel (*b*) a written proposal on an intended marriage by persons authorized by the lady's father, but not signed, was considered to be taken out of the Statute of Frauds by a letter written and signed by the father long after the marriage, admitting the terms of the written proposal. And it was laid down by Lord Lyndhurst, C., that the principle of law, at least of equity, was this: that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and

(*a*) See Deeds, *infra*.

(*b*) 12 Cla. & Fi. 45; 3 Beav. 469, *nom.* De Biel *v.* Thomson. See Hughes *v.* Gordon, 1 Bligh, 287. Montgomery *v.* Reilly, 1 Bligh, N. S. 62, 1 Dow, N. S. 364; Maunsell *v.* White, 1 Jo. & Lat. 539, now before the House of Lords on appeal.

plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal. The point really decided by the House of Lords, affirming the judgments of Lord Langdale, Master of the Rolls, and Lord Cottenham, C., was, that in a proposal by the father to pay down 10,000 *l.*, and settle it regularly, and that the intended husband should secure a jointure of 500 *l.* a year, the following clause left the father no option, but was a binding absolute agreement to settle another 10,000 *l.*: Mr. T. (the father) proposes for the present to allow his daughter 200 *l.* per annum for her private use, subject to a possibility of a reduction in that sum in case political or other circumstances should diminish his income, and also intends to leave a further sum of 10,000 *l.* in his will to Miss T., to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. This always appeared to me a point of great nicety. The Lord Chancellor, in moving the House to affirm the judgment, observed, that the father did not say merely that he intended to settle 10,000 *l.* by will, but he pointed out the particular form of that settlement, the manner in which it was to be arranged, and eventually, in case there should be no children, that then he should have the power by his will of disposing of the property. Did that look like a voluntary act which was not at all to be obligatory upon him? Why was all that arrangement set out if he was not to be bound by it? Why were these stipulations to be inserted in this part of the instrument? They were altogether unnecessary. Why was he to be restrained only in a certain event to have a power over this property if it was to be considered that he was not bound to bequeath the property at all unless he thought proper to do so? Lord Brougham and Lord Campbell

concurred, and the decree was accordingly affirmed without hearing the respondents. If the true construction of these proposals had been deemed to be, to settle 10,000 *l.* absolutely, but to leave the other 10,000 *l.* as well as the 200 *l.* per annum in the option of the father, the proposal would have expressed simply the father's *intention* as to the further sum of 10,000 *l.* as contradistinguished from his contract as to the first sum, and the language would have presented no difficulty: he no doubt intended to leave by his will 10,000 *l.* to his daughter and her children, but to dispose of it as he thought fit if she had no children. That was his intention, and therefore it was fully stated, just as a father would have done in a conversation upon a proposal for his daughter. And as this was arranged by his sons as his agents, they stated in writing what he proposed and intended; but such a statement (unless it amounted to contract) would not prevent the father from withholding the sum altogether, and making no such disposition as he expressed his intention of making. The form of the proposals was not unimportant: 1. The clear binding proposal to settle 10,000 *l.* 2. The equally binding proposal on the other side to secure the jointure. 3. The proposal, clearly not binding, to allow the 200 *l.* a year, followed by the statement of the intention as to the further sum of 10,000 *l.* If the 10,000 *l.* was to be a payment binding on the testator, why did it not find its place next to the 10,000 *l.* to be paid down? The Lord Chancellor concluded his observations on this point by stating the rule of equity already quoted as to the operation of inducements held out by one party to another to celebrate a marriage; but this is a case to which that doctrine could hardly apply, because here there was an actual contract to be executed, and the only question was, what was its proper construction. If the concluding part of the proposal was not in its true meaning a contract, but merely the statement of an intention, which was not to be

binding, no rule required that it should be deemed binding, because the marriage contemplated was solemnized (I).

2. In Lord Glengall *v.* Thynne (*c*), a father was held not to be bound by a memorandum of the terms of a settlement agreed to be made by him and the intended husband of his daughter, and written down by the father's solicitor, as instructions, by his direction. After a treaty and the terms had been agreed upon, the solicitor, at the desire of the father, Mr. Mellish, drew up the following memorandum: "Mr. Mellish to transfer 100,000*l.* consols into the name of trustees, to pay the dividends to Miss Mellish for her life, to her separate use; on her death without children, to revert to her father's estate. Should there be children, to go to the

(*c*) Printed Cases, D. P. 1848, 1 Kee. 769; 5 Beav. 245, *nom.* Lord Glengall *v.* Barnard.

(I) In Maunsell *v.* White, 1 Jo. & Lat. 569, before the case of De Biel and Thompson had been heard in the House of Lords, the Chancellor of Ireland observed that he did not think that it bore on the case before him, for there the memorandum amounted to an agreement for a settlement. Of that there was no doubt, although there was a doubt whether it was executed pursuant to the Statute of Frauds. The question arose, whether by one of the terms of the contract it was imperative on the father to make the settlement of the second 10,000*l.* There was a settlement actually contracted for, for 10,000*l.* down; the question was, whether he was bound to make a settlement of a second 10,000*l.* by his will. It was evident that the difficulty was, how to draw the distinction between the two sums of 10,000*l.* There was a contract to settle a certain portion, and a declared intention to settle something else. Was that declaration of intention to be considered to amount to an actual settlement? As to the concluding paragraph in the memorandum, that the disposition of the second 10,000*l.*, supposing Miss Thompson had no children, was to be prescribed by the will of her father, that was said to show that in no other case was the disposition of the 10,000*l.* to be reserved to the father; but the argument in reply to that would be, that all this was merely expressive of intention, that he intended to settle the 10,000*l.* on his daughter and her children, and on failure of her issue to do with it what he pleased. The Chancellor said he did not see how that bore on the present case. It went a long way, he thought, in holding the memorandum to be a settlement of the second 10,000*l.*, but he did not say that it was not rightly decided. He was, however, clearly of opinion that it was not a decision binding upon him in that case.

younger children, as the parents may jointly appoint; if no such appointment, then to go among such younger children, share and share alike; and if only one such child, to such only child. Lord Glengall to exercise the power contained in the settlement by covenanting to charge his estate with a jointure of 1,200*l.* per annum in favour of his lady, and 20,000*l.* in favour of the younger children, subject to a like power of appointment among them." These terms were approved of by both parties, but *they were afterwards varied by mutual consent,* without however altering the amount of the lady's fortune. Drafts of the necessary deeds were prepared by the direction of Mr. Mellish, and approved of by counsel of his own selection: he had expressed his wish that the marriage should take place on the 30th of January, but on the 27th, before the deeds could be engrossed, he died. Lord Glengall made the settlement agreed upon on his part, and the marriage took place. Lord Langdale, Master of the Rolls, held that, notwithstanding the length to which the treaty had gone, the consenting disposition of all parties, and the common satisfaction which prevailed as to the proposed terms of the settlement, yet, up to the time when Mr. Mellish died, all the arrangements were contingent and provisional. So long as he was competent to attend to business he might, if he had so pleased, have withdrawn his consent to the marriage and refused to make any settlement. He did not think that the terms of the agreement were, or by any of the parties were, considered to be finally settled at the time when the memorandum was written, and if the terms had been then concluded upon, and not afterwards deviated from, he thought that the solicitor could not be considered as having acted upon that occasion as the agent of both parties, lawfully authorized by them to bind them by his signature of their names in the memorandum, which he made for the purpose of stating the terms of the contract then contemplated. He distinguished

the case from that of an auctioneer, and held that the solicitor, in performing the ministerial act of writing down the terms of the proposed settlement, so far as they were at that time agreed upon, had no authority to bind either party. From this decree there was an appeal to the House of Lords, which was dismissed, and the decree affirmed with costs to the respondent, the other daughter of the testator (I).

3. A bond, executed on an intended marriage, in a penalty conditioned to be void if the obligor gave by will, or some other means, unto or in trust for the intended wife or her issue, so much in money or in valuable effects as he should by his will bequeath to any one of his next of kin, or to any other person whatsoever, was held by Lord Eldon, C., to amount to an agreement to make the settlement (without reference to the amount of the penalty), which a court of equity would specifically perform, and that view was supported in the House of Lords by himself, Lord Brougham, C., and Lord Plunket, and the decree was affirmed (*d*).

4. Want of mutuality may under certain circumstances be a sufficient ground for a court of equity to refuse a specific performance. In the case of Hamilton *v.* Grant (*e*), it appeared that Lord Bellew was tenant for life of certain estates, with a power of jointuring over all or any part of them, with remainder (in the event, which happened, of the failure of his issue male) to his sister in tail. The sister had a son, Lord Boyne, by a first marriage, and she had a second husband, Mr. Dickson, by whom she had no issue. Shortly after her second marriage, Dickson, her husband, and Lord

(*d*) Logan *v.* Wienholt, 1 Cla. & Fi. 611; 7 Bligh, N. S. 1. See French *v.* Macale, 2 Dru. & War. 273.

(*e*) 3 Dow. 33.

(I) Lady Glengall was fully provided for by her father's will, made before the treaty for the marriage. See *post*, as to the question of satisfaction in regard to her sister's portion secured by settlement.

Boyne, her son, entered into an agreement, by which it was stated that Dickson had executed a bond to Lord Boyne that he would not join in any fine or recovery without Lord Boyne's consent, and the latter agreed that he would, immediately after he should become seised of the estates, or any of them, convey in fee to Dickson such part as he should choose of the value of 200 *l.* per annum, and also an annuity of 200 *l.* per annum to Dickson for life, out of the estates, and Dickson agreed to abstain from joining in any fine or recovery without Lord Boyne's consent. Dickson's wife lived for some years and died in his lifetime; he survived her several years and died in the lifetime of Lord Bellew, who survived him several years. Lord Boyne survived them all, and inherited the estates in possession. The Court of Exchequer in Ireland, notwithstanding considerable delay in the litigation, decreed a specific performance of the agreement to convey lands in fee of the value of 200 *l.* per annum. This decree was reversed in the House of Lords, upon the advice of Lord Eldon, C., and Lord Redesdale. Lord Redesdale held that there was no mutuality, as there could have been no specific performance against Dickson; he also thought there was no consideration, as there was no proof that Dickson's wife had any disposition to dispose of the estate from her son, and that it gave Dickson an undue influence over his wife; he considered too that there was a great inequality in the contingencies, to which he attached weight, in this agreement between a son-in-law and a father-in-law [a step-son and step-father], and he also relied on length of time; and he considered it as a point of some weight that the agreement was unreasonable in giving to Dickson the option to select any portion of the estate. Lord Eldon, C., concurred in some of these objections, but he was not disposed to say that there was no consideration, but supposing it to be a case of valuable consideration, still he thought the agreement ought not to be executed specifically: he particularly relied upon the

improvidence of the agreement, and the delay in enforcing it.

5. In a case (*f*) from Ireland, a contract by a father to settle a possibility upon his son and his issue, subject to the reservation of a life estate to himself, and the son was to be at the expense of a commission of lunacy against the actual owner of the estate, was supported by the House of Lords. There was a family estate, which the father had conveyed his interest in to the son, subject to a life annuity and portions for the father's younger children, and the son, upon his marriage, had put that estate into strict settlement. The owner of another estate in fee, to whom the father was heir presumptive, was in an unsound state of mind. If the father died during the lifetime of that person and the son survived him, he would become the heir presumptive. The father and son, in order to secure the estate, entered into an agreement by deed, by which it was recited that the son had agreed to sue out a commission of lunacy against the alleged lunatic at his own expense (which was afterwards prosecuted with effect), and in consideration of such agreement, and for natural love and affection, the father covenanted with the son that after the decease of the lunatic the lands should remain vested in the father to his own use for life, and then to the uses of the settled estate, and he covenanted with the son that the hereditaments agreed to be settled as aforesaid should at all times remain to the uses of the settlement. It was held by the House of Lords, on the advice of Lord Cottenham, C., and Lord Wynford, reversing a decree of Lord Plunket's, that this was a binding agreement. The Lord Chancellor was of opinion that the agreement was not

(*f*) Persse *v.* Persse, West, 110; 7 Cla. & Fi. 279. See Farmer *v.* Farmer, Printed Cas. D. P. 1848, where the party was born deaf and dumb. As to the right to an inquiry into the consideration, see Hunt *v.* Maunsell, 1 Dow, 211; and as to contracts between father and children, and between each other, see Ball *v.* Beresford, Printed Cases, D. P. 1824. And see Stewart *v.* Stewart, 6 Cla. & Fi. 911, as to the acts of an agent.

illegal, as partaking of champerty and maintenance (I), for there was no suit to be maintained nor property in litigation to be divided. 2. Nor was it illegal, as against public policy, and a fraud on the Great Seal in matters of lunacy. 3. It could not be impeached for want of mutuality: the risk had been incurred, and the benefit accrued, and the consideration paid. If this objection could prevail, how, it was asked, could decrees for specific performance, where the defendant only signed the agreement, or upon part performance, be maintained? 4. The covenant was not merely voluntary—some consideration proceeded from the son. As to inadequacy, the intention of the parties and the properties in question, afforded a complete answer to that objection. The agreement with the son effected all that could be done to secure the lunatic's estate to the family, and if it should descend to the father, secured its reunion with the family property. By what scale of money-consideration were these objects to be estimated? The impossibility of estimating them had led to the exemption of family arrangements from the rules which affect others. The consideration in this and in other such cases is compounded partly of value and partly of love and affection.

6. As regards contracts between attorney and client, Lord Eldon, C., in Cane *v.* Lord Allen (*g*), said that he could find no such doctrine as that an attorney could not deal with his client. If the attorney were employed to sell, if he dealt for the property, he must put an end to the confidential relation, or put himself completely at arm's length; or if the contract was afterwards quarrelled with it would be incumbent upon him to show that he had made a reasonable use of that confidence, and had given as ample and correct

(*g*) 2 Dow, 289.

(I) See Lord Cholmondeley *v.* Clinton, 4 Bligh, 1. An agreement between an heir-at-law and devisee, where right doubtful, to recover the estate and divide it, is illegal.

advice and information to his client as he would have done if his client had been dealing with a third person. He conceived also that if an attorney were employed as agent in the management of a landed estate, he could not deal with his principal for that estate without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent; and unless he did that, the contract, if questioned, could not be supported. But independent of these particular circumstances, an attorney did not stand exactly in the situation of a trustee. The general rule, that a trustee to sell could not purchase the trust estate, was pretty well settled. But there was no such rule with respect to an attorney. In the case in which these observations were made, Lord Redesdale thought that, in fact, the relation of attorney and client did *not* exist between the parties, so as to place the attorney in a situation to throw any obstacle in the way of his making the purchase. He was not employed to sell, nor in the character of a general agent or manager, and took no advantage of confidence placed in him by Lord Allen, or of any superior knowledge of the value of the estate acquired as agent. The facts of the case were that Cane had bought an estate, in possession of Lord Allen, for a full price, and which was duly conveyed to him; but a small part of it being subject to an estate for life in a third person, an agreement, of equal date with the conveyance, was entered into, that, on the death of the tenant for life, Lord Allen should sell and convey to Cane this part of the estate, at 22 years' purchase, according to the rent paid for the same at the date of the agreement; the purchase money to be paid when the land should be conveyed. Cane, under an agreement made the year after, advanced a portion of the purchase money to Lord Allen, for which he was to be allowed interest, at 4 ½ per cent., till the death of the tenant for life. The tenant for life did not die till 33 years after the contract, and there had been a very long delay, which never can occur again in

Ireland (*h*), in prosecuting the suit for a specific performance. The Court of Exchequer, upon Lord Allen's representative consenting to account for the money advanced, with interest, dismissed the bill, without costs; but this decree was reversed in the House of Lords. It was insisted that the contract was an improvident one. The price was not to be paid until the estate fell into possession, and then it was to be calculated upon the rent obtained when the contract was made; but Lord Eldon, C., and Lord Redesdale, overruled this objection. Lord Eldon said, that in purchasing this estate, it was natural to deal for this reversionary corner. The whole appeared to have been considered as one transaction, and that transaction contained nothing unfair.

7. Surprise is a ground upon which specific performance may be refused. In Willan *v.* Willan (*i*) an uncle on his death-bed having sent to his nephew, wishing to give him the preference of a farm (which the uncle held under a prebendary, renewable, as usual, every seven years at a fine at the will of the prebendary, and which the nephew held by a sub-lease from the uncle), but being so far in a state of imbecility that he could not understand any business that required thought, reflection, or consideration, although of sufficient mind to execute a codicil, the same day executed an agreement to cancel the existing sub-lease, and to grant a new lease for 21 years, renewable every seven years for ever, as long as he held the same from the prebendary, at a fixed rent, and the lessee was to pay any fines on account of an increase of buildings. The lessor almost immediately after the agreement was executed told his nephew that it must not stand, it was giving away the estate: the nephew answered, if you do not approve of it when you are

(*h*) General Orders of Court of Chancery in Ireland, 1843.

(*i*) 16 Ves. 72; 19 Ves. 590; 2 Dow, 275. See Magrane *v.* Archbold, 1 Dow, 107; Blakeney *v.* Baggott, 1 Dow, N. S. 401; 3 Bligh, N. S. 237.

better, the agreement shall be cancelled. It seems to have been admitted that the lessor's interest, from the number of fines not thrown on the lessee, would soon cease to be of value. Lord Eldon, C., decreed the agreement, and a lease granted under it by trustees under the lessor's will, to be delivered up to be cancelled: he adhered to this view upon a rehearing, and upon an appeal to the House of Lords the decree was affirmed, upon the advice of himself and Lord Redesdale. Lord Eldon, C., thought the case one of surprise upon the parties, and he held that as the agreement could not be supported *in toto*, it could not be maintained to the extent of one lease for 21 years. Lord Redesdale said that it was scarcely possible to suppose that any man in full possession of his faculties could enter into such an agreement for valuable consideration. Then it was said this was partly for natural love and affection [no such consideration was expressed on the face of the agreement]. But when an agreement purported in the body of it to be for valuable consideration, it could never, though obtained by a relation, be supported on the ground of natural love and affection, for if it could, every agreement with a relation must be supported, however inadequate the consideration. His conception of the case was this—that when a contract was manifestly unreasonable, if one of the parties taken by surprise, while in a state of debility, was made to depart from an original intention, and to act contrary to a previous design, then the contract ought to be set aside, as this was an advantage taken of his infirm state. This observation shows that the case was not decided upon the mere ground of surprise, collected from the disadvantageous terms of the letting.

8. Fraud is of course sufficient to avoid a contract. So is undue influence (*j*), and a party intoxicated, so as to be

(*j*) Collins *v.* Hare, 2 Bligh, N. S. 106; 1 Dow, N. S. 139. Wheeler *v.* Wheeler, Printed Cases, D. P. 1826; Gordon *v.* Selby, 11 Bligh, N. S. 351. Maccabe *v.* Hussey, 5 Bligh, N. S. 716; 2 Dow & Cla. 440; Farmer *v.* Farmer, Printed Cases, D. P. 1848.

incapable of doing any solemn act, will not be bound in equity by a contract or instrument obtained from him whilst in that state (*k*). But a transaction which might originally be avoided—*e. g.* a security from a principal to his agent on the ground of undue influence, or the like—may of course be rendered valid by a deliberate confirmation with full knowledge of all the circumstances (*l*).

9. An anxious and a just protection is afforded to heirs apparent, dealing with their expectancies (*m*), even where the contract is executed by formal deeds; but the rule on this subject appears to have been relaxed in the decision of the case of King *v.* Hamlet (*n*). Mr. King was an heir apparent, and upon a re-settlement of the estates shortly after he attained 21, had an annuity of 800 *l.* per annum secured to him for the joint lives of himself and his father, Lord Lorton, and the estate was after his father's death settled strictly. Mr. King soon involved himself, and was no longer under his father's control, when, according to the evidence of Newland, Hamlet's attorney, two persons, Ferrall and Burt, an attorney, who were not examined as witnesses, and who afterwards withdrew from the transaction, in April 1828 applied to Newland for an advance of 5,000 *l.* or 6,000 *l.*, which he could not obtain; and they then applied to know whether Hamlet, the goldsmith and jeweller, would assist, and proposed that the advance should be partly in money and partly in goods: he said it was ultimately agreed that the transaction should wholly consist of goods. But he said that at an early stage Ford stated himself to be then the solicitor of Mr. King, and the negotiation was then to be carried on and concluded between him and Ford; so that we can

(*k*) Butler *v.* Mulvihill, 1 Bligh, 137. See Nagle *v.* Bayler, 3 Dru. & War. 60.

(*l*) De Montmorency *v.* Devereux, 7 Cla. & Fin. 188; West, 64; 1 Dru. & Walsh, 119.

(*m*) See Blakeney *v.* Baggott, 1 Dow, N. S. 405; 3 Bligh, N. S. 237.

(*n*) 4 Sim. 223; 2 Myl. & Kee. 456; 3 Cla. & Fin. 218, where the facts are not fully stated; the marginal note appears to state the facts according to the decision.

contrast the evidence of these two persons. It seems that Ferrall introduced himself to Lord Lorton with the information that his son was in the hands of sharpers: in consequence of this Lord Lorton, in May or June 1828, had an interview with Newland for a few minutes at a London club; he did not recollect what passed, but he believed that Hamlet was acting *bonâ fide* in a proposed advance of 8,000 *l.* to his son on mortgage. Lord Lorton believed that Hamlet wanted him to give a counter security, and he requested Mr. Serjeant Lefroy, in the summer of 1828, to see Newland on the subject and to protect him. Lord Lorton's object evidently was, if he could, to protect the estate; Hamlet's to obtain at least Lord Lorton's sanction to the alleged loan. The first point therefore is, did Lord Lorton know the real nature of the transaction. Now Newland, on his cross-examination, stated that at his interview with Lord Lorton he urged him (Lord L.) to advance his son the money, and he admitted that, although it was contemplated by himself and by Hamlet that the whole of the advance should be made up of goods, he did not inform Lord Lorton of either of the said matters or state to him anything relative to goods. He stated that it had been agreed by Ferrall and himself and Hamlet that the latter should sell to King goods to the amount of 8,000 *l.*, for which he was to have a mortgage security. This was before he showed the mortgage draft to Mr. Serjeant Lefroy. We shall presently see what passed at his interview with that gentleman. The only proof of knowledge on the part of Lord Lorton was Newland's examination in chief, in which he stated that Ferrall (who was not examined) declared most distinctly that Lord Lorton was aware that his son was to have goods and not money, and that Lord Lorton concurred in the transaction, though he understood from Ferrall that he would not make himself an avowed party to it. He further positively stated that at an interview with Serjeant Lefroy and Mr. Anthony Lefroy, his son, he mentioned to Mr. A. Lefroy that the transaction

was wholly for goods. Against this single witness there were Mr. Serjeant Lefroy, to whom the draft of the mortgage was shown, who said that he had no knowledge or suspicion that any goods were to be furnished, and he believed it to be a money transaction only. Mr. A. Lefroy took no active part in the matter, being a legal matter which he did not understand. Newland did not inform him or give him reason to suspect that the consideration for the mortgage was to be formed wholly or in part of goods, nor did he inform Lord Lorton that goods were to form part of it. Lord Lorton himself deposed that neither Newland, nor A. Lefroy, nor Serjeant Lefroy, nor Ferrall, nor any other person, before the execution of the mortgage, informed him, nor had he any reason to suspect that goods formed any part of the consideration. Newland, as we have seen, admitted that he did not communicate the fact in the only interview he had with Lord Lorton. This disposes of the case as far as it depended upon Lord Lorton's knowledge of the real nature of the transaction, and, as we shall see, the mortgage was so framed as to keep the parties in ignorance. As between Mr. King and Hamlet, Ford's evidence explains the transaction. He was applied to by Newland, who declined to name a client willing to advance 10,000 *l.* to King. Newland was furnished with an abstract of title, and then stated that his client would advance but half in money and the other half in goods, and finally that Hamlet was his client, and that he had no ready money, but would advance in plate to the extent of 8,000 *l.*, which was accepted. Ford said he advised that the whole should be taken in plate, but that Hamlet required that it should be taken out of the general stock. In the result Mr. King and Ford took from the stock jewellery to a great amount, including three diamond necklaces, one charged at 1,155 *l.*, and a suite of pearls, which alone cost upwards of 1,500 *l.*; two pairs of diamond earrings, a diamond comb, a ruby and diamond suite, four gold snuff boxes, eight gold chains, and three gold watches, and a small

quantity of plate. The shopmen deposed that they took what they pleased. The profit on silver plate was from 12 to 17½ per cent.; on jewellery, 25 per cent. These goods Mr. King was not allowed to take away with him, but they were detained for a month, when the deeds having been registered in Ireland, &c., and the bill of Hamlet's attorney, of 400 *l.*, paid by King, the attorney gave an order for their delivery, and they were sent to Ford's, King's attorney, and a few days afterwards deposited with an auctioneer upon a loan, and afterwards sold by auction at a ruinous loss. No deduction was made from the shop prices, although upon ready-money transactions 5 per cent. was always allowed. This was the consideration. Newland proved that the first application to him was for a loan of 5,000 *l.* or 6,000 *l.* When first applied to, Mr. King had only disposed of a portion of his 800 *l.* per annum. Pending the negotiation he sold the residue and left himself without any present provision. When goods only were to be furnished, for which, of course, Mr. King had no occasion except as money's worth, it became necessary to increase the advance. Now that we have seen what the consideration really was, we may look into the securities. A plain mortgage from King to Hamlet, describing the latter as of Cavendish-square, Esquire, as upon an actual advance of 8,000 *l.* in money, carrying interest at once (although the usual deduction of 5 per cent. for ready money had not been made,) without any reference to the sale of goods, and with a regular receipt endorsed for 8,000 *l.* money, accompanied by a promissory note for 8,000 *l.* payable on demand, policies of life assurance for the like amount, and warrants of attorney to enter up judgments in England and Ireland, and upon which judgment was entered up in Ireland before the goods were delivered. It was proved that Hamlet had been applied to to receive back the goods. It was thought that such a transaction would be set aside in equity, and accordingly Sir John Leach, V. C., granted an injunction against the securities being put in force by

Hamlet, upon the payment of the money produced by the resale of the goods: he considered the case to be governed by that of Barker *v.* Vansommer before Lord Thurlow, 1 Bro. C. C. 149. Lord Brougham affirmed this order, but upon the cause coming on to be heard he took an unfavourable view of the evidence, treated Barker *v.* Vansommer as an authority not applicable to this case, and dismissed the bill filed by Mr. King for relief, and dissolved the injunction (I).

10. The Court in deciding this case laid down two propositions as incontestible, as applicable to the doctrines of equity upon the subject of an expectant heir dealing with his expectancy.

1. That the extraordinary protection given in the general case must be withdrawn if it shall appear that the transaction was known to the father or other person standing in *loco parentis;* the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him.—2. That if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not in any respect act upon it so as to alter the situation of the other party or his property; at least that if he does so the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing.

Now the first of these rules is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained. The knowledge of the parent *may*, under

(I) Lord Brougham said that Barker *v.* Vansommer did not at all depend upon Mr. Barker being an expectant heir, and he could not be said to be dealing upon his expectancy; 2 Myl. & Kee. 484, 485. It appears that Barker was a student at Wadham College, just of age, entitled to an estate of 1,200*l.* in reversion, and likewise about 6,000*l.* in money. 1 Bro. C. C. 149; and see the cases cited in the arguments.

some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although his father may witness his ruin with indifference. It is the son's equity, although partly grounded upon public policy. In many cases the person standing in *loco parentis*, or from whom the *spes successionis* is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods if the seller will relinquish the securities. If the offer is refused, and the heir then sell them—which is simply accomplishing the purpose for which they were bought,—it would not be possible to maintain that he had forfeited any equity which he originally had to impeach the transaction (*o*).

11. Upon an appeal to the House of Lords, Lord Brougham said that he did not think there was any ground to say that the general principle acted upon in courts of equity in the cases cited was involved in this, but there were peculiarities in it not to be found in those cases. Lord Lyndhurst, C., came to the conclusion that he saw no ground whatever to dissent from the judgment, and the decree was affirmed without costs. It would seem to be difficult to maintain this decree upon satisfactory grounds. It was insisted in argument that where a shopkeeper knows that the sale of the goods in his shop is simply nominal, and that they must be really sold in a very different market, equity relieves against

(*o*) These observations are extracted from Sugd. Purch. 316. The appellant rejected favourable terms of compromise which were offered by Mr. Hamlet.

a pretended sale in the shop, and treats it as a loan having an usurious tendency, and as a catching bargain, and allows him only the sum realized by the sale in that market to which he knew they were destined; and for this position Barker *v.* Vansommer, 1 Bro. C. C. 149, was cited. Lord Lyndhurst is reported to have expressed a doubt whether the facts were correctly stated in the report to warrant the observations made by Lord Thurlow. The pleadings and briefs were sent to Lord Lyndhurst, and they showed that the report was correct (*p*). But this case depended upon the general rule in equity. The security was for a pretended advance of money; whereas the money was advanced in the shape of goods, with a benefit to the lender of some 20 per cent. profit; and yet the very sale was not treated as one, for the usual rebate of 5 per cent. was not allowed, nor was the supposed buyer allowed to have the goods until the security for the pretended loan was perfected. The security was for the whole 8,000*l.*, immediately carrying interest; so that the very 400*l.* which ought to have been deducted, not only remained a debt, but carried interest at 5 per cent. According to the report the learned counsel for Hamlet in the House of Lords said, this was the sale of a reversion, or, which comes to the same thing, the purchase of goods for a money price and giving the reversionary property as a security for payment. Serjeant Lefroy perused the deed, and it was impossible to suppose that he or any man conversant with conveyancing could mistake the object of that deed, and fancy it was a security for the advance of money. This proves how difficult it was to sustain the decree below by argument.

12. An heir entitled to an estate tail in remainder upon his father's life estate, and, indeed, an heir expectant, generally may deal with his expectancies according to their value in the market; therefore he may grant post obits at the market price of such securities, and the purchaser,

(*p*) 3 Cla. & Fin. 239, n.

although bound to show that he has given the fair market value, is not bound to show that that value is regulated by the tables of actuaries; nor can the sale be defeated by showing that the price is below the rates in the tables. A sale by auction fairly conducted is binding, as the price obtained cannot but be deemed the market value—the thing is worth what it will fetch. The House of Lords simply followed the rules, which, although not without a struggle, had previously been established by the courts below (*q*).

13. An *agreement* to make a lease as a qualification for a Member of Parliament, although not so expressed, will not be enforced in equity. If intended as a gift, it could not be enforced as between brothers; if set up as a sale, the inadequacy of price may show that a contract for sale was not intended: nor can an agreement which is uncertain in its terms, be enforced. These points were decided in Callaghan *v.* Callaghan (*r*). Patrick was the owner, by purchase from Daniel, of an estate for lives, renewable for ever at a nominal fine, subject to a rent of 160 *l.*, and a portion of it was sublet in like manner, subject to a like rent, so that Patrick occupied the residue without rent. Daniel made a proposal in writing to Patrick, which the latter accepted and signed, to take a sub-lease of the latter portion for his, Daniel's, life and the lives of two other brothers, to be free of all rent and assessments during Daniel's life, and to be subject to the annual rent of 350 *l.* during the other lives surviving him. On the same day that Patrick signed the acceptance of the proposal, Daniel and he signed a memorandum that "rent to become due and payable half-yearly, on every 1st of May and 1st of November henceforward." There was no change of possession. Patrick shortly afterwards died, and Daniel filed a bill against his heir for a specific performance of the agreement, as amounting to a sale, and subject only to rent

(*q*) Lord Aldborough *v.* Trye, 7 Cla. & Fin. 436; Bernal *v.* Lord Donegal, 3 Dow, 133; see 1 Bligh. N. S. 594; and see Sugd. Purch. 316–324.

(*r*) 8 Cla. & Fin. 374.

after his own death. Lord Plunket, C., thought that the agreement was intended *bonâ fide* as a permanent contract, independently of any intention, as alleged, that it should be used as a qualification; and he thought there was nothing in the objection of the ambiguity as to the payment of the rent. But still he dismissed the bill, although without costs, on the ground that the agreement was not so reasonable and did not appear to have so fully received the consideration of the parties with respect to such circumstances as might have rendered it reasonable, as would warrant a court of equity in enforcing it (*s*). Upon an appeal against this decree to the House of Lords, the appeal was dismissed with costs, but on other grounds. Lord Cottenham, on moving the affirmance of the decree, observed that it was so obviously impossible to support this transaction as a purchase and sale (I), that the plaintiff examined witnesses to prove that Patrick intended to make him a present of the property. It would be hazardous to rely upon this evidence, which was not the ground upon which the bill sought relief; but if believed, it would go far to disprove the plaintiff's title to it, as courts of equity do not decree performance of incomplete gifts. It was true that in general courts of equity do not refuse their assistance to a purchaser merely because the price is inadequate, but the inadequacy might be so great as to prove fraud or that the parties could not have intended

(*s*) 8 Cla. & Fin. 384, n.

(I) Lord Cottenham observed that this portion of the property, being about half of the whole, might be considered as subject to about half of the whole rent of 160*l.*, and was besides subject to half of the whole of the assessments. By this agreement, Patrick was, during the whole of Daniel's life, to remain subject to this rent and assessments, without receiving any rent in return, so that it was not only a present of the property to the plaintiff, as it belonged to Patrick, but of the rent and assessments to which it was subject, and this of a residence and lands upon which Patrick was himself living, as he continued to do till the day of his death. Upon this passage we may observe, that as the whole rent was reserved on the sub-lease of the portion actually let, Patrick in effect held the portion in hand free of rent, and it was so considered by both parties.

a contract of sale; and such was the present case, and the evidence in the cause not only proved that they did not intend a sale, but he thought proved what they did intend —there could not be a doubt but that the whole transaction took place in order to afford evidence of the plaintiff's qualification. Upon the uncertainty introduced by the memorandum for payment of the rent *henceforward*, he observed that it would be very difficult, if there were no other objection, to reconcile the proposal and this memorandum. Lord Brougham concurred—he thought the only object was to create a qualification.

14. Although a contract be executed abroad, yet whatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made (*t*).

15. If the price or rent be referred by a contract to arbitrators, and they misconduct themselves in making the valuation, equity will not decree a specific performance of the contract (*u*).

16. An agreement by an heir at law and devisee out of possession, where it is doubtful in which of them the right is vested to recover the estate and divide it between them, is contrary to the policy of the law, as well as the statute of Hen. 8, against pretended titles (*x*). Such persons, Lord Redesdale observed, are incompetent to make a bargain upon the subject affecting any person, except the person in possession; they are both competent to make a composition with him if he thought fit, but competent to deal with no other person by the statute, which is only an affirmance of

(*t*) Don *v.* Lippmann, 5 Cla. & Fin. 1. See Fergusson *v.* Fyffe, 8 Cla. & Fin. 121. As to a right of action for breach of duty in performance of contract see Brown *v.* Boorman, 11 Cla. & Fin. 1. A Peer may make a valid contract for his own benefit with a railway company, dependent upon a Bill passing, he stipulating to withdraw his opposition. Simpson *v.* Lord Howden, 9 Cla. & Fin. 61.

(*u*) Chichester *v.* M'Intire, 1 Dow, N. S. 460; 4 Bligh, N. S. 78.

(*x*) Lord Cholmondeley *v.* Clinton, 4 Bligh, 1, 42–45, 90, 123.

the common law upon the subject of pretended titles by adding penalties.

17. A contract contrary to public policy is void. Thus in Fauntleroy's case (*y*) an assurance by him on his life was deemed void, in consequence of his subsequently committing a felony, for which he suffered death, although the policy contained no saving. Sir John Leach, Master of the Rolls, sustained the policy, but upon an appeal to the House of Lords the decree was reversed upon the advice of Lord Lyndhurst, C. He thought it clear that an assurance expressly against the event would be void, and therefore effect could not be given to a general policy upon an event, which if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void. This is a case of the first impression.

(*y*) Amicable Society *v.* Bolland, 4 Bligh, N. S. 194; 2 Dow & Cla. 1. See Clift *v.* Schwade, 3 Mann. G. & S. 437; and *qu.* the decision.

SECTION II.

OF DEEDS.

2. *Fausset* v. *Carpenter: conveyance to a purchaser restrained to sellers' beneficial interests.*
2. *Observations on the case.*
3. *Unsoundness of mind.*
4. *Compromise of rights.*
5. *Security for loans and settlement by way of family arrangement not usurious: confirmation.*
6. *Exception of coals to seller in fee whilst owner of certain lands: estate and right may be transferred.*
7. *Composition deed executed by creditor reserving right to securities.*
8. *Money bond: whether an indemnity.*
9. *Clear gift: ambiguity as to events which have not occurred.*
10. *Where a word may be supplied in a passage in itself clear.*
11. *Mistake by grantor: effect of acts permitted to be done by grantor according to intention of grant.*
12. *Principals and sureties in grant.*
13. *Where grantee for charity entitled to surplus.*

1. In the case of Rancliff *v.* Parkyns (*a*), Lord Eldon, C., observed, that there was an old determination that a witness to a will or deed must be taken to have cognizance of all its contents. But that doctrine had not of late been acceded to; and it would be most mischievous if one who had been a witness to a deed or will, and afterwards happened to be concerned in a transaction relative to other property, should be supposed to have notice of the contents of the will or deed to which he was a witness, so as to fix notice of them upon his principal on that accidental ground.

2. In Fausset *v.* Carpenter (*b*) a dangerous precedent was made at law for confining the operation of a conveyance to

(*a*) See 6 Dow, 224 & 210. See Gosbell *v.* Archer, 2 Adol. & Ell. 500; Sugd. Purch. 127. Lord Eldon, in Rancliff *v.* Parkyns, had in view the facts of the case before him, but he meant to lay down the proposition generally.

(*b*) 2 Dow & Cla. 282; 5 Bligh, N. S. 75.

a purchaser by several parties having distinct interests, to the portions which they could properly convey in equity. The estate in question had vested in three daughters in fee as co-heiresses: Catherine, Anna Maria, and Elinor. Catherine, on her first marriage, conveyed her third to two trustees in fee, of whom Henry Palmer was one, for her husband for life, then for herself for life, and then for the issue of the marriage. There were several children of this marriage, and Catherine married a second husband. Anna Maria married, and made no settlement of her one-third; and Elinor married Henry Palmer (the trustee under Catherine's settlement), and she made no settlement of her one-third, and afterwards died, leaving her husband and one son surviving her. Fausset contracted to buy the estate for 4,000 *l.*, and was ignorant of Catherine's settlement. The real interests of the sellers stood thus: Catherine's one-third was vested in fee in Henry Palmer and the other trustee in trust for Catherine for life, and her husband was of course interested in her life estate in his marital right. Anna Maria's one-third was vested in fee in her and her husband; and Elinor's one-third was vested in her husband as tenant by the curtesy, and the fee was vested in the son, subject to the father's estate. Catherine and her second husband, and Anna Maria and her husband, levied fines of their several one-thirds; and by lease and release they and Henry Palmer, in consideration of 4,000 *l.* paid by Fausset, viz. 1,333 *l.* 6 *s.* 8 *d.* to Catherine and her husband, 1,333 *l.* 6 *s.* 8 *d.* to Anna Maria and her husband, and 1,333 *l.* 6 *s.* 8 *d.* to Henry Palmer, did, and each of them did, grant and release to Fausset in fee all the lands and estate in question, and all the estate, right, title, interest, use, trust, inheritance, property, claim, and demand whatsoever, either at law or in equity, of them the grantors, and each and every of them, of, in, and to the said lands, &c., and every part and parcel thereof, together with all documents of title relating to the same. And the husband of Anna Maria

for himself and Anna Maria his wife, and for his and her heirs, executors, and administrators; and the husband of Catherine for himself and Catherine his wife, and for his and her heirs, executors, and administrators; and Henry Palmer for himself, his heirs, executors, and administrators, and for the heirs of Elinor his wife, deceased, covenanted with Fausset and his heirs and assigns, that notwithstanding any act, &c. by them, or by the father of the three ladies, they, the two husbands and wives, and Henry Palmer, or some or one of them, were or was seised in fee of the lands conveyed: and that they, or some or one of them, had right to convey, and for quiet enjoyment of the lands and every part thereof, against the husbands and wives, and Henry Palmer or any of them, their or any of their heirs and assigns, or any other person or persons lawfully claiming or to claim any estate, right, title, trust or interest, either at law or in equity, of, in, to, or out of the lands conveyed, or any part thereof, from, by, or under, or in trust for them or any of them, or Elinor Palmer, or the father, their or any of their heirs or assigns: and that free from or otherwise by the two husbands and wives, and Henry Palmer, their heirs or assigns, indemnified against all grants, estates, &c. &c. (in very full words) made or to be made by them, or by any of them, their heirs or assigns, or by any persons lawfully claiming or to obtain any estate, &c. at law or in equity in the lands, or any part thereof, from, or by, or under, or in trust for them or any of them. And for further assurance by the two husbands and wives, and Henry Palmer, and the issue of Henry by Elinor his late wife, and her heirs, and all persons claiming any estate, right, title or interest, either at law or in equity, in the lands or any part thereof, from, by, or under, or in trust for them or any of them. And it was declared that the fines should enure to Fausset in fee. Upon an ejectment by the surviving trustee (Henry Palmer having died first) under Catherine's settlement, after her death it was insisted that

the deed to Fausset operated as a conveyance by Palmer of one moiety of the fee in Catherine's one-third. The Judge at *nisi prius* in Ireland held otherwise, and upon a bill of exceptions his opinion was supported by the Court of King's Bench in Ireland, and their judgment was affirmed in the Exchequer Chamber there, and that judgment was affirmed by the House of Lords, without taking time to consider. The law Lords who advised the House were Lord Wynford and Lord Tenterden, C. J. Lord Wynford said, as to the construction of the deed, he took it on the principle stated by Sir E. Sugden, the counsel for the appellant. He stated that the purchaser takes what the parties conveying assume to sell, and buys that and no more.[?] Then look at the deed, and see what is the scope and effect of it. Palmer and the other parties interested agree to sell, and they were to collect from the whole of the instrument taken together, whether it was the intention of Palmer to convey only that estate in the premises which belonged to him in right of his wife, and which he was entitled to convey (I), or whether it was his intention to convey also the legal estate in which he had no beneficial interest, but which he had merely as a trustee. The only difficulty in this case arose from the double character held by Palmer with respect to these estates, and then in what he conveyed. Mr. Abbot put the principle in the strongest possible way, that in judging of the design and object of a deed, you will not presume that a party executing the deed meant to do and did what he was wrong in doing, when a construction may be put on the instrument perfectly consistent with his doing only what he has a right to do. He had a right to convey his own estate, but he did wrong if he conveyed more. The parties to the deed were the two married daughters and their husbands, and Henry Palmer, who as his wife was

(I) It does not appear that Henry Palmer had acquired the fee in his wife's one-third, and yet he assumed to convey it as a portion of the fee in the entire estate. See the covenant for further assurance.

dead, was probably tenant by the curtesy, and they conveyed the estate to Fausset in consideration of 4,000 *l.* *If the instrument had stopped there one might say that each meant to convey the entirety*; but mark what follows: in three equal proportions of 1,333 *l.* 6 *s.* 8 *d.*, stated to be severally paid to each of the said grantors respectively. Each therefore takes his proportion of the price, and the fair presumption is, that each sells his proportion only. By the covenants for title and quiet enjoyment Palmer appears to be dealing only with the interest which he had in right of his wife, and covenants for himself and for her heirs. Sir E. Sugden said that the covenants were strong in his favour since they went to the entirety of the estate. No doubt they might be considered as leaning to his side of the question if taken in these terms, but they must take the whole of the instrument together, and then it appeared that *each covenants for what he sells, and then the whole three covenant for the entirety of their interests.* The plain meaning *therefore* was, that Palmer does not here convey the estate which he had as a trustee, and which he would have done wrong in conveying; but that he conveys only the estate which belonged to him in right of his wife, and which he had a right to convey. Lord Tenterden relied upon precisely the same grounds. The question was, whether the deed operated as a conveyance by Palmer only of that in which he was beneficially interested, or extended to that estate of which he was a trustee. The question here was not as to whether a person having two estates, both of which he might innocently convey, but as to a person having two estates, one of which he might innocently and properly convey, and the other of which he could not convey without fraud and a breach of trust. He (Lord Tenterden) was satisfied that all the parties conveying meant to convey only what belonged to themselves, and that Palmer meant to convey only that part which belonged to him in right of his wife. He then stated how the consi-

deration was paid. That, he said, standing alone would intimate that the parties meant to convey only what properly belonged to them, and that supposition was confirmed by the covenants. The form of the covenants showed that Palmer looked only at the right of his wife, and to what it was lawful for him to convey, and the Court was not bound to extend the scope of the instrument further, where that was sufficient to satisfy its meaning, and so the judgment was affirmed with 100 *l.* costs.

2. I do not remember any decision which was so generally condemned as this in Westminster Hall (*c*). The rights of the purchaser were entirely disregarded. He was ignorant of the settlement by Catherine; and her eldest son, one of the *cestuis que* trust under it, witnessed the execution of the conveyance to the purchaser by his mother. All the parties to that conveyance conveyed the whole estate to the purchaser in fee. How, in the face of that conveyance, could any of those parties claim any interest as still remaining vested in them, although they were capable of conveying them? Palmer was, no doubt, a trustee of Catherine's third; but he did not disclose that circumstance to the purchaser. How, then, could he protect himself in that character by confining the operation of the conveyance to his own wife's third? He might have so confined it if he had chosen, but, no doubt, such a desire would have raised suspicion in the purchaser's mind, and he would not have completed the purchase. A fraud was committed on the purchaser. Who was to suffer, — the person who assumed to convey with other parties the whole, or the purchaser who relied upon the conveyance? Catherine was equitable tenant for life of her third; she and her second husband by fine and by the deed conveyed this third; and Palmer also in terms conveyed it, for he conveyed the whole, yet his conveyance was, by construction, confined to his wife's third; so that the purchaser, according to this

(*c*) See Sugd. Purch. 1022.

decision, did not even obtain Palmer's legal estate in the very quantity of interest to which Catherine and her husband were equitably entitled. Trustee and *cestui que* trust join in a conveyance to a purchaser, and the equitable interest only is held to pass. If Palmer's conveyance operated to convey Catherine's life interest, that is, the legal estate for her life, of course the fee passed, for the fee was expressed, and was intended to be conveyed. The deed was cut down in its operation at law, not from anything which appeared on the face of it, but from the real state of the title, proved by extrinsic evidence, but which was not communicated to the purchaser. If the decision is capable of being supported, it must be considered as a case in which three parties, claiming the fee in thirds, conveyed the whole estate to a purchaser, and the deed was construed to convey only one-third by each; so that any estate which any of them had in the other two-thirds still remained in them. The circumstance that one of the sellers had an estate as trustee in another third, for another of the sellers and others, never could be made a ground for controlling the legal operation of the conveyance, where the trustee did not disclose the trust, but joined with the *cestuis que* trust, having a limited estate, and allowed them to convey as if the fee were vested in them. The question is not simply what the sellers intended to convey; we must consider also what the purchaser supposed they had conveyed, and what the words imported. Whoever conveys to a purchaser without restraining the operation of his conveyance, should be deemed to convey in every character which enabled him to give effect to his deed. This is a rule which has always been acted upon. The Lords relied upon two grounds: 1. That the consideration was paid in thirds, but surely that was entitled to no weight; the payment was a correct one, but the parties conveyed the whole, and no prudent purchaser would be content with a conveyance in a more limited form; if such had been the intention each party would have

confined his conveyance to the one-third, to which he claimed to be entitled. 2. That the intention was shown by the covenants, whereas, on the contrary, although each confined himself to the acts of the persons claiming his own third, yet each covenanted for the title to the whole. And even if the covenants had been confined by each party to his own third, for which there is an established form often used, yet that would have formed no ground for cutting down the conveyance by each of the whole. Nothing can be more consistent than, in such a case, taking a conveyance from all parties of the whole estate, and yet confining the covenants of every seller to the share which he claims, and the acts of the parties under whom he claims his share (I). In the case of Drew *v.* Lord Norbury, in Ireland (*d*), the Chancellor observed that he took it to be clear that where a person having several estates and interests in lands, joins in conveying all his estate and interest in them to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance. It was true that, in Fausset *v.* Carpenter, the House of Lords took a different view. At the time when that cause was decided it was thought to be impossible to maintain the decision; and it was a subject of consideration among the profession, whether it would not be advisable to bring in a short Act of Parliament to reverse it. That case could not operate to weaken the rule of law. Nothing could be more mischievous or contrary to law than to hold that where a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him, in the character in which he purported to join in the conveyance;

(*d*) 2 Jo. & Lat. 284.

(I) For what will pass by general description, see Turner *v.* Dickenson, 3 Cla. & Fin. 592; and as to the exhibition of a plan of a street, see Feoffees of Heriot's Hospital *v.* Gibson, 2 Dow, 301.

and he acted in the case before him upon this view of the law.

3. Where the question before a jury was, whether the grantor was competent, in point of mind, to make the conveyance, it being agreed upon both sides that the alleged incapacity did not arise from lunacy, the Judge at *nisi prius* in Ireland directed the jury that the question for them to try was, whether the grantor was a person of sound mind or not; that to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without any glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns, and that as one test of such incapacity the jury were at liberty to consider whether he was capable of understanding what he did by making the deed when its general purport was generally explained to him. Exception was taken that the Judge refused to direct the jury, that in order to avoid the deed at law, the unsoundness of mind of the grantor must amount to that degree of unsoundness of mind which constitutes idiotcy according to the strict legal definition of an idiot. The Court of King's Bench in Ireland overruled the exceptions, and in the Court of Exchequer Chamber, the Judges being equally divided, six against six, the judgment was affirmed, and was ultimately affirmed by the House of Lords upon the advice of Lord Tenterden, C. J. and Lord Plunket (*e*). Lord Tenterden said that the proposition was, that the Judge ought to have told the jury that they had no right to consider any description of unsoundness except what constituted idiotcy according to the strict legal definition of an idiot, but he thought that the Judge was right. The question to be tried was, as the Judge stated, whether the grantor was a person of sound mind or

(*e*) Ball *v.* Mannin, 3 Bligh N. S. 1; 1 Dow, N. S. 380. See Creagh *v.* Blood, 2 Jo. & Lat. 509, as to lucid intervals.

not. Perhaps the learned Judge went too far when he said, that to constitute such unsoundness of mind as would avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life (I), but that could not be complained of under the bill of exceptions. He directed the jury that it was not necessary that he should be without any glimmering of reason, and as one test of incapacity, they were at liberty to consider whether he was capable of understanding what he did by executing the deed in question when its general purport was explained to him. This observation would not make the whole direction erroneous, nor was it irregular or improper when considered in connexion with the other parts of the direction. In his (Lord Tenterden's) opinion it was right.

4. In a Scotch case in the House of Lords (*f*), Lord Eldon, C., observed that according to all law, and upon principle, where there is fairly a doubt as to the rights of parties, and an agreement without fraud, it is binding; that in case of doubt as to legitimacy, as in Cann *v.* Cann, 1 P. W. 723, an agreement between claimants to divide the property would be valid. The case of Gordon *v.* Gordon, 3 Swanst. 400, he observed, stood upon a different ground, because there was a suppression of a material fact by one of the parties, viz. the private marriage of the father, which the defendant knew, and called a mere ceremony. But the force of the argument in that case was, that the fact, whatever its character might have been, should have been communicated at the time of the agreement. Such communication was held to be essential to the fairness and validity of the transaction between brothers on a question of rights depending upon legitimacy.

5. A deed may be void for usury, but a *bonâ fide* family

(*f*) Hotchkin *v.* Dickson, 2 Bligh, 348.

(I) See the argument of counsel, 3 Bligh, N. S. 18.

arrangement will not be deemed usurious merely because it secures a loan with legal interest, and the borrower, by way of settlement, makes other provision for the lender. Thus, in Arkwright *v.* Lord Huntly (*g*), where the purchaser objected to the title on the ground that a deed upon which the title depended was void as usurious; it appeared that the estate, on the 16th June 1809, stood limited in equity in trust for Mr. Kynnersley for life, with remainder to his sons in tail male, with remainder as to one moiety for Mr. Clarke for life, and as to the other moiety for Lady Ormonde (the daughter of Mr. Clarke) for life for her separate use, with remainder as to the first-mentioned moiety for her for life, in like manner, with remainder as to the whole for her sons successively in tail male, remainder for her daughters in tail with cross remainders between them in tail, with remainder for trustees for 1,000 years to pay the legacies, with the ultimate remainder for Mr. Clarke in fee. By deed of the 16th June 1809, between Mr. Clarke and Lord and Lady Ormonde, but which was not executed by Lord Ormonde, after reciting the state of the title to the estate, and that Lord Ormonde had at various times advanced money to or on account of Mr. Clarke, and might probably make future advances to or on his account, and also had become security for various sums raised by him and otherwise for him, and that he (Clarke) was desirous of securing the repayment of all the said sums of money, and was also desirous of settling the hereditaments to which he was entitled, as before-mentioned, to the uses, &c., after mentioned; Mr. Clarke, accordingly, in order to effectuate that intent, and for natural love and affection, and in consideration of the premises, conveyed his moiety and the entirety of the estate in question to certain uses, under which trustees took several terms of years, for securing, at given times, the advances with interest at 5 per cent., and to the use of Mr. Clarke for life, with remainders for the benefit of Lady Ormonde's sons in tail, and for Lord and

(*g*) Printed Cases, D. P. 1825.

Lady Ormonde and Mr. Clarke, and a power of revocation was reserved to Mr. Clarke and Lord Ormonde. After Mr. Clarke's death, Mr. Kynnersley died without issue male, and the estate fell into possession, and Lord and Lady Ormonde in her right, if the deed of 1809 was void, had sufficient estate to give validity to it. By deeds of 1816 and a fine in which the deed of 1809 was recited, and that on an account between Lord Ormonde and the estate of Mr. Clarke, 45,000 *l.* was due to the former, as Lord and Lady Ormonde thereby admitted, and was, with interest at 5 per cent., by the deed of 1809 charged upon the estate comprised in that deed in manner therein mentioned, Lord and Lady Ormonde conveyed the estates to the uses declared by the former deeds and by the deed of 1809, and the legal estate was transferred to the like uses. The purchaser objected to the title on the ground that the deed of 1809 was usurious. Sir John Leach, V. C., decreed a specific performance, from which decree there was an appeal to the House of Lords. The reasons signed by Messrs. Horne, Shadwell, and Wigram were because the deed of 1809 was usurious and void on the face of it; and if not, yet the provisions of that indenture were so pregnant with the inference that the same was connected with, or was made in pursuance of some usurious contract, that the appellant ought not to be compelled specifically to perform his contract in the absence of the heir-at-law of the late Lady Ormonde, who, when forthcoming, might be entitled to dispute the appellant's title on the ground of usury, and who, it was admitted by the vendors, could not at present be found. The reasons for the respondent signed by Messrs. Sugden and Lynch were, that the whole transaction was a *bonâ fide* family arrangement, and was accounted for by the circumstances and relative characters of the parties, and the provisions of such a deed should not be spelled for the purpose of making out by construction a usurious contract, and that supposing the deed of 1809 to be invalid, like uses were created by the deed of 1816.

The House of Lords declared and adjudged that nothing appeared in the deed of 1809, whereby or by reason whereof the same ought to be considered as usurious; and that according to the true construction of the deed of 1816, the estate was effectually limited to the uses of the prior settlement and the deed of 1809, and therefore that with respect to the deed of 1809, in which it was before declared that nothing appeared by reason whereof the same ought to be considered as usurious, if the same could have been impeached as usurious upon any evidence, if such evidence were held admissible, the objection to the title upon such ground would be effectually removed by the fine and deed of 1816, and therefore the order of the Vice-Chancellor was affirmed. The House of Lords thus decided two points: 1. That the deed of 1809 was not void for usury on the face of it. 2. That if it could be avoided by evidence of an usurious contract, yet the settlement by Lord and Lady Ormonde confirmed it, although it contained no recital of any invalidity in the deed or any intention to confirm it on that account.

6. In Lord Cardigan *v.* Armitage (*h*) an exception of coals to the grantor and his heirs out of land conveyed, whilst he and they should be owners of land not granted, was held to authorize a transfer of such last-mentioned land with the right to get the coal. Lord Cardigan brought an action of trespass against Armitage for entering his land, getting, and carrying away the coal. The defendant, by two special pleas, justified, by the first, both the entry and the getting and carrying away, and by the second justified only the entering into the land for the purpose of carrying away the coals wrongfully raised by Lord Cardigan, and deposited and lying near the land. Lord Cardigan demurred to the pleas, and after a joinder in demurrer the Court of King's

(*h*) Printed Cases, D. P. 1826. Norbury *v.* Meade, 3 Bligh, 211, effect of exception in lease of impropriate tithes of the tithes of particular lands.

Bench gave judgment generally for the defendant. It appeared that in 1649 Sir Thomas Danby conveyed to Lord Saville in fee an estate comprising the lands in question, with an exception to Sir Thomas, his heirs, and assigns, of all tithes of corn and grain, and also with an exception to Sir Thomas and his heirs of all the coals in all or any of the lands, together with free liberty for Sir Thomas and his heirs, and his and their assigns and servants, at all times during the time that he and his heirs should continue owners and proprietors of the demesne lands of Farnley, to sink and dig pits, or otherwise to weigh and get coals, in all and every the lands conveyed, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their will and pleasure, he the said Sir Thomas and his heirs giving and paying unto Lord Saville, his heirs and assigns, satisfaction for all such damages as he and his heirs should sustain by reason of the digging, &c., as two gentlemen, neighbours thereunto indifferently chosen by the said Lord and the said Thomas, their heirs, and assigns, should award. The title to the demesne lands, the manor of Farnley, and the coals, ultimately became vested in William Danby, who, in 1800, sold and conveyed to Armitage in fee the manor, with its rights, members, and appurtenances, and all and singular the coals, mines, veins, seams, and quarries of coal, open or unopen, lying and being in or under (amongst other lands) the lands in question. The pleas averred that the lands out of which the coals were removed were part of the demesne lands of the manor until they were severed therefrom by the conveyance from Sir Thomas Danby, and that Armitage, under the conveyance to him by William Danby, became seised in fee of the manor, and owner and proprietor of the demesne lands thereof, and entitled to such coals so excepted as aforesaid, with such liberty as before mentioned. The points raised by Armitage were: 1. That under the conveyance in fee of the demesne lands to him he was the owner of the coals; or, 2. Admitting that the

liberty to get the coals, &c., was extinguished by the alienation of the fee of the demesne lands to Armitage, yet that at all events he had a property in the coals themselves, and that such right entitled him to judgment under his second plea (*i*). From the judgment of the King's Bench the plaintiff brought a writ of error in the House of Lords. The reasons for the reversal, signed by Mr. Sugden and Mr. Tindal, were, because the manifest intention of the parties to the deed of 1649 was to reserve to the feoffor and his heirs the coals lying under the lands therein mentioned, and the liberty of getting the same during such time only as the grantor and his heirs should continue owners and proprietors of the demesne lands of Farnley, and consequently by the conveyance of the demesne lands in 1800 all right to the coals and to the liberty of getting the same entirely ceased and was extinguished; or that, at all events, the right to enter into the plaintiff's lands for the purpose of digging and getting the coals was, under the circumstances, entirely at an end and determined. The reasons for the respondents were signed by Mr. Littledale and Mr. Preston, and were, 1. That according to the true construction of the deed of 1649 the coals were absolutely excepted and reserved out of that deed, and remained vested in Sir Thomas Danby in fee, with full right in him and his heirs to convey the same to any person or persons, in the same manner as if the deed had not been made, which supported their second plea. 2. That when anything is excepted out of a grant, all powers and liberties necessary for obtaining the thing excepted are impliedly excepted, and therefore the liberty to sink and dig pits, &c. (I), which was obviously necessary for the obtaining the coals excepted, was impliedly excepted out of the deed of 1649, and that made their first plea good. 3. That a liberty impliedly given to any grantee shall not be restrained by any power or liberty expressly

(*i*) 2 Barn. & Cress. 197; see 4 Barn. & Cress. 504; 5 Barn. & Cress. 847.

(1) This means an unqualified right, and not restricted by the ownership of the demesnes.

given or excepted, if such express power be only in affirmative words, and that made both pleas good. 4. That granting that the liberty so impliedly excepted out of the deed of 1649 was restrained by the express power to sink and dig pits, &c., contained in the deed, still, according to the fair construction of the deed, even that express power was reserved to Sir Thomas Danby, his heirs and assigns (whether by descent or purchase) as long as he or they should be at the same time owner and proprietor, or owners and proprietors, as well of the demesne lands of Farnley as also of the coals excepted; and Armitage, claiming through Danby, was owner of both, and therefore the pleas were good. The judgment given in the Court of King's Bench was affirmed by the House of Lords.

7. A creditor of a firm, with securities from one of the firm, entitled to a further debt from the firm not covered by the securities, may, upon executing a deed of composition by the firm with their creditors, sign "without prejudice to any securities whatever that he holds," and may afterwards recover upon the securities (*j*).

8. Where a simple money bond is given, it lies upon the party impeaching it, if he insist that it was given by way of indemnity, to prove the defence by evidence (*k*), and it will not be inferred from slight circumstances.

9. Where there are found in a deed terms of gift directly applying to the case which has occurred—a clear and distinct expression of the intention of the party—those terms

(*j*) Duffy *v.* Orr, 5 Bligh, N. S. 620; 1 Cla. & Fin. 253: the contest was between the single creditor and the member of the firm who gave the securities. Looking at the deeds which were executed, this point can hardly be said to have called for a decision. See 2 Beav. 394, n.

(*k*) Nicol *v.* Vaughan, 2 Dow & Cla. 420; 1 Cla. & Fin. 49; 6 Bligh, N. S. 104; 7 Myl. & Kee. 253 (*nom.* Lord Winchilsea *v.* Garetty); 7 Bligh, N. S. 395. Three orders and three appeals, and all reversed. The point in the text requires no authority. Sir John Leach held the bond to be one of indemnity from circumstances. See Walker *v.* Hardman, 4 Cla. & Fin. 258; 11 Bligh, N. S. 229. As to evidence sufficient to convert advances into gifts, see Mortimer *v.* Trezevant, 4 Cla. & Fin. 657; 11 Bligh, N. S. 191.

of gift are not to be superseded by ambiguities not having reference to the particular state of circumstances which has occurred, but to other events which have not occurred, and which therefore call for no decision (*l*).

10. Where in a deed a particular passage has a distinct operation, yet if other words in the instrument cannot have their proper effect without the introduction of a word in the first passage, it may be supplied by construction on the ground of mistake (*m*). This however can rarely happen.

11. In Lord Cholmondeley *v.* Clinton (*n*), Lord Eldon, C., observed that although you are bound by law to give the legal effect to the terms in which an instrument is expressed, he was not ready to admit that if the limitation has had a different effect from that which appears to have been the intention of the grantor, provided you can by legal means get at the evidence of that intention, and if that intention, differing from the legal effect of the deed, has been followed by a great variety of most important acts, deeply interesting to the welfare and property of other persons, he was not prepared to say that because such might be the legal effect of that limitation, therefore the grantor having mistaken his way of executing his intention, a party who has permitted these acts, proceeding upon the supposed intention, can at all times effectually come into a court of equity and obtain a relief which must be injurious to those parties whose acts he has permitted.

12. The question whether one of several grantors of an annuity is, as between himself and the grantee, a principal, or only a surety, must be ascertained, it is said, by the terms of the instrument itself; no extraneous evidence is admissible for the purpose. But where the grantors, although principals as between them and the grantee, yet as between

(*l*) Dill *v.* Lord Haddington, 8 Cla. & Fin. 168, per Lord Cottenham, C.

(*m*) See and consider Wight *v.* Dickson, 1 Dow, 141.

(*n*) 4 Bligh, 1, 83, 84, 92, 93; and as to the equity of parties claiming under the person who has made such a mistake, see 101, 102, 120, 123.

themselves are some of them sureties for the others, and the grantee knew that such was the case, he may by his dealing with the principals raise an equity in favour of the sureties, entitling them to the protection of a court of equity against the legal consequences of the instrument he joined in executing (*o*).

13. In Jack *v.* Burnett (*p*) it was laid down by Lord Cottenham, C., as the result of the decisions upon the right of grantees of a property for charity to the surplus not otherwise disposed of, first, that, generally speaking, in searching for the intention of the donor, it will be assumed that he intended to confer a benefit upon the donee in the enjoyment of any increase of the fund, should such gift be to the donee subject to certain payments to others; 2dly, if the gift be upon condition of making certain payments subject to a forfeiture upon non-performance of the condition; or 3dly, if the donee might be a loser by the insufficiency of the fund, which indeed is consequential upon the last (I).

(*o*) Per Lord Cottenham, C. Hollier *v.* Eyre, 9 Cla. & Fin. 1, reversing the decree below, Llo. & Goo. t. Plunket, 250. See Squire *v.* Whitton, 1 H. of L. Case, 333.

(*p*) 12 Cla. & Fin. 812, 828.

(I) As to the right of a court of equity to decree an account of a public trust, whether a charitable use or not, see Attorney-General *v.* Corporation of Dublin, 1 Bligh, N. S. 312; Corporation of Dublin *v.* Attorney-General, 3 Cla. & Fin. 289; 9 Bligh, N. S. 325; Skinners' Company *v.* Irish Society, 12 Cla. & Fin. 425; Parr *v.* Attorney-General, 8 Cla. & Fin. 409. A trust for redemption of captives was applied to schools. Ironmongers' Company *v.* Attorney-General, 10 Cla. & Fin. 908. A trust for poor and godly preachers for the time being of Christ's Holy Gospel was held to be a trust for Protestant Dissenters, excluding Unitarians and members of the Church of England, and extrinsic evidence was admitted. Shore *v.* Wilson, 9 Cla. & Fin. 355, affirming decree below. Attorney-General *v.* Drummond, 1 Dru. & War. 353, standing for judgment in D. P. Printed Cases, 1848. A breach of trust by trustees of a charity fund cannot be made good in favour of a third person out of the trust fund. Heriot's Hospital *v.* Ross, 12 Cla. & Fin. 507. For the construction of 5 & 6 Will. 4, c. 76, s. 71, see Bignold *v.* Springfield, 7 Cla. & Fin. 71; Macn. & Rob. 837; Mercers' Company *v.* Attorney-General, 2 Bligh, N. S. 165, 184; Attorney-General *v.* Brazennose College, 2 Cla. & Fin. 295; 8 Bligh, N. S. 377.

SECTION III.

OF SETTLEMENTS.

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I. *Where there is a conflict, and therein of the operation of registry.*

1. In the case of Macniell *v.* Cahill (*a*) some important points appear to have been incidentally decided. 1. That a settlement executed by a father and son of their estate previously to the marriage of the son, although the father of the lady and the lady herself refused to execute it, was binding on the father and son; but, 2, that articles for a settlement by the son and the lady and her father, subsequently executed, but before the marriage, and which were registered in Ireland, where the lands were situated, before the settlement was registered, took precedence, both at law and in equity, of the prior settlement, notwithstanding the parties had, of course, notice of the prior settlement, and the articles were concealed from the father and the settlement itself was acted upon by the parties; 3, both settlement and articles were treated as fraudulent, and the settlement having first provided for the payment of debts of the father to a considerable extent, and also for a debt of the son's, and then to pay 200*l.* a year to the son during the father's life, the father was to be considered as personally bound to the son, that the estate was sufficient in value to answer the charges, although the clear rental did not much exceed 200*l.* a year; and, 4, that the son was personally bound by the first settlement, and also, so far as any estate was left in him, by the articles.

There were three estates; 1, Dunseverick, of which the father was tenant for life, remainder to the son in tail male, remainder to him in fee, the clear rental of which was 234*l.* a year; 2, Ballylesson, of which (subject to an estate for life in a third person, which fell in in the father's lifetime, and to 2,000*l.*, which might be, and accordingly was, charged by the first tenant for life under a power,) the father was also tenant for life, but with remainder to the son for life,

(*a*) 2 Bligh, 228; 2 Bligh, N. S. 316.

with a power to jointure to the extent of 200*l.* a year, remainder to the first and other sons of the son successively in tail male, with remainders over; 3, Sheeplands (being leaseholds for lives, and held by the same third person in quasi tail, and which fell in by his death without issue in the father's lifetime), of which the father was tenant for life, with remainder to the son in quasi tail, with remainders over. So that the father had only a life estate in the three estates, and the second estate (Ballylesson) was already in strict settlement. Previously to the son's marriage with the daughter of Daniel Chambers the father and son suffered a recovery of the first estate (Dunseverick), and by a settlement of the 15th October 1777, to which they and Chambers and his daughter and a trustee were parties, *that* estate was conveyed to the trustee, first, to pay the debts in the schedule, principally the father's, and then, out of the rents, to pay 200*l.* a year to the son during the joint lives of himself and his father, for a present maintenance (which was to be, and accordingly was, increased to 400*l.* a year during their joint lives, when the estate No. 3 fell in), and as to the residue of the rents, to the father for life, remainder to the son in tail male, in inaccurate terms; remainder to him in fee. The son charged the second estate with a jointure of 200*l.* a year, and Chambers agreed to pay a portion of 500*l.* with his daughter to the father. The operation of this settlement, therefore, was to secure the 500*l.* portion to the father of the son, and the payment of the debts out of the estate, in consideration of his securing 200*l.* a year out of the estate to the son during his, the father's, life, and another 200*l.* a year when the estate No. 3 should fall in; for, subject to these provisions, the Dunseverick estate was resettled on the son in tail male, with remainder to himself in fee. The father and the son and the trustee executed this deed, but Daniel Chambers and his daughter refused to execute it, and they and the son, without the knowledge of the father, executed another deed (not referring to the

first), dated ten days later, by which the son covenanted that as soon as he should be seised of the estates of which his father was then seised (being Nos. 1 and 2) he would vest them in trustees to the use of himself for life, remainder to the first and other sons of the marriage successively in tail male, subject to a jointure of 400*l.* a year to the lady, 200*l.* a year of which was to issue out of the Dunseverick estate, and with a provision of 6,000*l.* for portions of younger children. Now this settlement was wholly inoperative as to the estate No. 2 (Ballylesson), for that was already settled, and the son had by the first settlement executed his power of jointuring over it, but it assumed to dispose of *all* his interest in Dunseverick, and in any view would operate as far as articles could on his estate tail and remainder in fee under the first settlement, executed by him and his father, but it made no provision for the debts. These articles were registered, as we have seen, before that settlement; but Chambers gave a bond to the father for the 500*l.* portion, and the trustee entered upon the estate of Dunseverick and applied the rents, first, in payment of the 200*l.* a year to the son, and then in reduction of one of the debts of the father secured by the settlement, and the father paid the additional 200*l.* a year to his son when the estate No. 3 fell in. Lord Eldon, C., and Lord Redesdale concurred in thinking the whole transaction to have been a fraud on all sides, the father deceiving the son, and the son deceiving the father. The latter, in moving the judgment, observed that the articles were registered before the deed, and the priority of the registry, *both in law* and equity, gave a priority to the instrument so registered, though subsequent in date and execution. But the deed, nevertheless, bound the son as his agreement. So far as the two instruments were inconsistent he was bound personally by the deed. The parties were responsible, therefore, by that their agreement for the debts mentioned in the schedule; they must be paid according to the trusts; and as the son thus

made his estate liable for these debts, so he became entitled to the benefit of that instrument against his father, *who thereby, as it must be intended, undertook that the estate was sufficient to answer the charge.* Upon any other supposition the transaction would be unfair and fraudulent, for the father taking the portion of the son's wife, gave an estate inadequate to the purpose intended and professed. *In consequence of such inadequacy the limitation to the issue, for which in fact the consideration was given,* might have been wholly or partially defeated. The parties therefore who executed, had under this instrument mutual demands, which were personal, so far as was inconsistent with the posterior settlement: the son, to make good to the father the payment of the debts; the father, to establish for the son the income thereby provided for maintenance *and the limitations to the issue.* He repeated that the effect of the transaction was to constitute the father and son mutually and personally creditors and debtors to a certain extent. The father was bound to make good to the son the annuity provided by the deed and the interest of the debts charged on the estates, otherwise the deed was a fraud on him and the persons to take subject to the charge. *The issue of the marriage might have had nothing.* According to the true intent of the settlement, the parties executing became mutually and personally debtors, so far as the deed could not have the effect contemplated or professed by means of the estate conveyed. It is important to observe to what extent these views were carried out by the elaborate decree of the Lords. The settlement and articles were declared to be personally binding on the father and the son, but so far only as the settlement might be deemed just and reasonable as between the father and the son, attending to all circumstances. And it was declared that, according to the meaning of the settlement, the father was entitled to have the debts to which he was liable charged on the estates comprised in the deed, *so far as the son had any interest in such estates, after the execution of the articles,* and the son was entitled to

have the debts due from him also charged on the estates, and he was also entitled to the several annuities provided for him. And inasmuch as it appeared that the rents were inadequate to the payment of the 200*l.* a year and the interest of the debts, *the deed ought to be taken to have been so far entered into by the son under a mistake or misapprehension of the annual value.* And inasmuch as the father received the wife's portion, the father ought to be deemed to have been a debtor to the son *for the amount of such portion*, so far as to give the son the full benefit of such deed on his part, both with respect to the annuities and the payment of his own debts mentioned in the deed. And that *the son ought to be deemed a debtor to the estate of his father in respect of so much of the principal of the debts of his father as were paid by his father, but not for interest thereof, nor for the interest of his own debts, during the life of his father.* But, on the contrary, the son ought to be deemed a creditor on his father's estate for so much of the interest of his own debts accrued during the life of the father as was not paid by his father.

2. Upon this singular decision several observations arise. Lord Redesdale's statement that the priority of registry gave effect to the articles both at law and in equity is not correct. Although the father claiming under the prior settlement was ignorant of the articles, yet the prior registry of them gave them undoubtedly priority, yet only as articles, and not as binding the estate at law (*b*). But although want of notice to the father of the prior registered articles was unimportant, yet notice to the parties to the articles of the prior settlement at the time they executed the articles, and therefore at the time of registry, which it is said was effected by the contrivance of Chambers before the registry of the settlement, and the acting by the parties under the settlement and concealing the articles, would, according to the ordinary rules of equity, have prevented the parties under the articles

(*b*) See Drew *v.* Lord Norbury, 3 Jo. & Lat. 267, 9 Ir. Eq. Rep. 171.

from taking advantage of them as against the settlement. But the father and son were considered to have each committed a fraud on the other, and the son's wife had no interest under the articles in Dunseverick during her husband's lifetime, and the rights of the issue under the articles were not properly before the House, for the question as to the debts secured by the settlement but left unprovided for by the articles was between the son and his father's estate, and from the state of the account would be settled between the son and the father's estate.

3. This leads me to consider the singular observations and declarations as to the considerations (I). Lord Redesdale, in his final speech, appears to have lost sight of the fact that no provision was made for the issue of the marriage (except through the father as tenant in tail) by the settlement: they were provided for by the articles only, which were fraudulently executed without the father's knowledge: he therefore could not be made responsible for those provisions. The net rents of the estate put in settlement were insufficient to pay the interest of the debts and the 200 *l.* a year. The relief given by the Lords' decree to the father appears to be, 1, to charge the debts on the *son's interest in the estate under the articles;* 2, *personally* against the son, for that was the effect of the declarations, I apprehend, having regard to the payments which had been made. The relief given to the son appears to be, 1, to give him a right to what was provided for him under the settlement, and for that purpose to treat the settlement as having been entered into by the son under a mistake or misrepresentation of the annual value of

(I) The debts secured by the settlement were 1,500 *l.* (which was originally the father's debt, but secured by the father and son, and properly was the debt of the estates, for it consisted of the costs and advances by the attorney in a suit by the father for the Ballylesson estate, which resulted in a compromise, and the settlement of that estate on the father and the son, and his issue), 150 *l.* the debt of the father, and 250 *l.* the debt of the son, the latter secured by the father and son. The son received upwards of 2,800 *l.* *under the settlement*, out of his father's life estates.

the estate; therefore, 2, to make his father a debtor to him for the amount of the 500 *l.* portion, as far as that was required to make good his claims, and 3, to make the father's estate liable to keep down the interest of all the debts during his life, without reference to the rental.

The relief against the father in respect of the inadequacy of the rental to meet the burdens imposed upon it, is open to observation: there was no misrepresentation as far as the evidence went; and it would be difficult to maintain that a son has an equity against his father because the latter on the son's marriage joins with him in settling an estate in which the son has the inheritance, for purposes which the annual value will not answer: nor does such a case fall under the head of mistake. It is not an unusual circumstance and the parties are bound to inquire, and would not in ordinary cases be entitled to any relief in the absence of fraud. The decree of the Lords made the son's remaining interest and himself personally responsible for the principal of the debts, except to the extent of the wife's portion received by the father and the interest during the father's lifetime of the debts. But still it was hardly consistent with the rules of equity to make the father liable to bring in aid the portion when the son had received first the 200 *l.* a year and then the 400 *l.* a year provided for him by the settlement, and had effectually defrauded, as the House held, the father of part of the security for the debts for which he had paid the consideration. The trusts of the settlement were, first, to pay the interest of the debts and then to pay the 200 *l.* a year to the son: subject to those charges the father was tenant for life. The father received nothing from the rents, for they were wholly absorbed in the payment of the 200 *l.* a year, and therefore he ought not to have been made by the decree liable, as between him and his son, to keep down the interest of the debt during his life. It would be difficult, on legal grounds, to sustain the elaborate decree in this case. It has more the character of an award than of

a decree by the House of Lords. There was another point decided between these parties, which we must consider elsewhere (*c*).

4. Upon the effect of registry in Ireland, it has also been decided that a settlement of a wife's leasehold estate previous to her marriage is invalid against a subsequent lease or sale by her husband in his assumed marital right, which is registered before the settlement. It is not important that the same party in such a case did not make the two conveyances in conflict; *e. g.* in this case the settlement was made by the wife before marriage, and the lease was executed by her husband after the marriage (*d*). The wife, who survived, recovered in ejectment after her husband's death, in the King's Bench in Ireland, but the persons claiming the husband's lease afterwards recovered in the Exchequer against the widow, and this decision was affirmed in the Exchequer Chamber there—the Judges being equally divided, and that judgment was affirmed in the House of Lords upon the unanimous opinion of the Judges, in which Lord Tenterden, C. J., who moved the judgment of the House, perfectly concurred. It was a point of novelty and of great nicety; but notwithstanding the great difference of opinion in Ireland, the Judges here appear to have arrived at the right conclusion unanimously.

II. *What interests are affected by settlements.*

1. Words confined to estates of inheritance, in a covenant by an intended husband to make a settlement, have not been extended to a less estate, notwithstanding a proposal by him to settle with other properties the property derived by the will under which he was tenant for life. The case was a peculiar one (*e*). Thomas Bowes was tenant in tail

(*c*) See Chap. 6, of Purchases, *infra*.

(*d*) Warburton *v.* Loveland, 2 Dow & Cla. 480. It was twice argued. I was of counsel for the widow; see Battersby *v.* Roehfort, 2 Jo. & Lat. 431.

(*e*) Willis *v.* Robinson, 1 Dow, N. S. 469; 4 Bligh, N. S. 101.

male (in remainder expectant upon life estates in his two elder brothers) of a large estate under the will of his grandfather. He was also tenant for life (in remainder expectant upon a life estate in an elder brother, and estates in tail male to the sons of that brother) with a remote remainder to himself in tail under the will of his grandmother. Being about to marry a ward of Court, he proposed in writing, that in case either of the limitations in his favour, contained in the wills of his grandfather and grandmother, should take effect, he would within twelve months after coming into possession, convey a portion of the annual value of 1,500*l.* to trustees to increase the lady's jointure; and to charge the estate so conveyed with additional portions for younger children, and subject thereto to limit the estate to the sons and daughters in the usual way in strict settlement. By the settlement, as approved of by the Master, Thomas Bowes covenanted, that if he should under either of the wills become entitled to the estates, or of any other estates, for *any estate of inheritance* in possession, or otherwise capable of being settled or bound in law or equity, he would make the settlement. Thomas Bowes became entitled in possession to the life estate under his grandmother's will, whilst his remainder under his grandfather's will was defeated by a recovery. It was held by the Vice-Chancellor that the life estate, notwithstanding the general terms of the proposal, was not bound by the settlement, and that decision was affirmed by the House of Lords, with the concurrence of Lord Lyndhurst, C.

2. In Scully *v.* Scully (*f*), by marriage articles, the intended husband covenanted that he would, by deed or will, leave, bequeath, or give, to the use of his intended wife, if she should survive him, not having any issue living at the time of his decease, the one moiety, or half of the fortune or substance that he should die possessed of or entitled unto; but

(*f*) Printed Cases, D. P. 1825. There were other complicated questions depending upon the doctrine of election and the conduct of the parties.

that if there should be issue of the marriage at his decease, then one-third of the fortune or substance which he should die possessed of or entitled unto. There was issue of the marriage; the wife survived, and the husband left considerable real and personal estates. Lord Manners, C., decreed a specific performance of the covenant in the articles, and declared that, according to the true intent and meaning of the articles, the widow was entitled to one-third of the real and freehold estates whereof the husband died seised, and to one-third of the clear personal estate whereof he died possessed, after payment of his debts and funeral expenses. From this decree there was an appeal to the House of Lords. The reason signed by Mr. Wetherell and Mr. Blake was because the articles ought not to be construed as affecting the freehold lands, inasmuch as the covenant only named his "fortune or substance," which words did not of themselves import freehold property. And the subsequent provisions showed that the property to be left to her was personal property, as they clearly contemplated a will only relating to personal estate. I have a full note of Mr. O'Connell's argument for the appellants. He insisted that the articles meant personal estate only; there was no provision for issue, and therefore it could not include real estate; the words were, fortune *or* substance, not *and*; those words were synonymous. If *personal* had been inserted, or *real*, the other would not have been included. The word seised was not used; the words were possessed or entitled, which apply to personalty only: again, the words were, leave, give, or bequeath, not devise; the covenant only meant that he would die intestate. The parties besides were Papists, and could not acquire real estate except by descent. He, however, admitted that fortune or substance *might* mean real estates: he quoted Doe *v.* Buckner, 6 Term Rep. 610. Mr. Shadwell and Mr. Sugden, for the respondent, relied upon the manifest intention, and cited Huxtep *v.* Brooman, 1 Bro. C. C. 437; Wienholt *v.* Logan, *infra*;

Hopewell *v.* Ackland, 1 Comy. 164. The House of Lords dismissed the appeal, and affirmed the decree.

3. If a person, for valuable consideration, agree to leave to another as much as he shall bequeath to any other person, he cannot by any contrivance evade the force of the contract, although he may, as against the party entitled, dispose of any portion of his estate in his lifetime absolutely, that is, as against himself as well as others, just as he thinks fit.

4. This was decided in Logan *v.* Wienholt (*g*). An uncle, upon the marriage of his niece, executed a bond, in the penalty of 4,000 *l.*, conditioned to be void, on payment, in certain events, of 2,000 *l.* or 1,000 *l.* for the niece and her issue, and also, if his niece, or any issue of the marriage, should be living at his death, and he should die unmarried, and without issue, and he should, either by his will, or by some other means, give or leave unto his niece, or the issue of the marriage, so much in money or valuable effects as he should by such will give to any one of his next of kin or nearest relations, or to any other person or persons (I) whomsoever; or in case he should make no such bequest, or such bequest should fall short of the greatest bequest in the will to any one of his next of kin, or any other person whomsoever, then if his executors and administrators should pay or deliver over such bequest, or make good any deficiency that the same should fall short of. In order to evade this obligation, the obligor invested large sums in the purchase of real estates, which, either by immediate or subsequent conveyances, were settled on himself for life, with remainder to a nephew and his wife, or one of them: like settlements were made of leasehold estates, and of bonds or other securities for money, but not reserving a life interest

(*g*) 7 Bligh, N. S. 1; 1 Cla. & Fin. 611. See French *v.* Macale, 2 Dru. & War. 273.

(I) Upon the meaning of the word persons, see 7 Bligh, N. S. 51, 52, 65; but I could suppose cases in which it might be operative.

to the uncle, although he received the interest; and such was the agreement of the parties. £. 57,000 stock was transferred in like manner to the nephew *and* his wife. By his will he made large provisions for his nephew and his wife, and their issue, and gave specific and pecuniary legacies to his nephew's wife, and a pecuniary legacy to the nephew, and a large one to the daughters of the nephew; and 5,000*l.* to the children of his niece, in satisfaction of the bond; and after some bequests to others, he gave all the residue of his estate and effects to his nephew, his heirs, executors, administrators, and assigns. Lord Eldon, C. decreed a specific performance of the agreement, as evidenced by the bond, and the children electing not to take the legacy in the will, were declared entitled to claim so much of the property disposed of by the will as would be equal in value to the largest amount of what was thereby bequeathed to any person or legatee, *whether specific, pecuniary, or residuary legatee.* And it was declared that the assignments of the securities, and the transfers of the stock, and all other voluntary dispositions of personal property remaining personal at the testator's death, in which he reserved or retained a life interest, or over the disposition of which he had a power of appointment or revocation, ought to be considered in equity, for the purpose of giving effect to the agreement, as having the same effect as if they had been bequeathed by the will to the persons after his death respectively entitled thereto. And the Master was to inquire whether there were any other like dispositions of personal estate, and what purchases the testator made subsequently to the bond of real estate conveyed to himself in fee, and which he afterwards conveyed, reducing himself to tenant for life, with remainder to others, or conveyed direct to himself for life, with like remainder; and the parties were to be at liberty to lay before the Master evidence as to the intent of the testator in every of the transactions of such purchases and conveyances, and especially with reference to

their proposed effect as to the operation of the marriage bond. Upon the hearing for further directions the Vice-Chancellor carried out the decree as to the voluntary dispositions of the personal estate; and he declared that the transfers into the joint names of the nephew and his wife of the 57,000 *l.* stock were to be considered for the purpose of giving effect to the meaning of the agreement, as giving to the nephew the same benefit as if such stock had been transferred into the sole name of the nephew, or been bequeathed to him by the will, but without prejudice to any question as to the interests of the nephew and his wife; and he decreed that all testamentary dispositions of freehold, copyhold, and leasehold estates, and dispositions of that nature, which by the decree were declared to be of the nature of testamentary dispositions, were within the meaning of the agreement; and that all the freehold and copyhold estates purchased by the testator after the bond were to be considered in equity for the purpose of giving effect to the agreement, as if they had been devised by the will. And the nephew appearing to take the largest benefit, the Master was to inquire what, at the testator's death, would have been the value of the benefits which the nephew would have taken under such several dispositions, according to the declarations in the original decree, if the bond had not been made. And the parties claiming under the bond were declared to be entitled to stand as specialty creditors upon the estate of the testator, for a sum equal to such value, with interest at four per cent. from the end of a year from the testator's death. And as between the parties taking the freehold and personal estate of the testator, it was declared that the general personal should be first applied, then the personal estate specifically bequeathed or disposed of, and lastly the freehold estates, in satisfaction of the demand.

5. From these decrees there was an appeal to the House of Lords. Lord Eldon said it was left to the Master to examine whether the real estate had not been purchased in

fraud of the agreement. The evidence given before the Master showed that purchases had been made in fraud of the agreement, and the principle was that the testator could not be allowed to commit a fraud on his own agreement. If a man agreed to leave all his children equally, and during his life gave to one of them a sum of money, that would be a gift in charity, but if he only gave the money, reserving to himself a life interest, that would not be a gift within the meaning of the covenant [or rather it would be a gift in fraud of the covenant]. Lord Eldon retained his original opinion. Lord Brougham, C., and Lord Plunket concurred in supporting the original decree, but the Lord Chancellor expressed a doubt as to the stock which the Vice-Chancellor dealt with as if transferred to the nephew, and his opinion was opposed to that of the Vice-Chancellor when he decreed that all the testamentary dispositions of leasehold, freehold, and copyhold estates were within the meaning of the agreement. He was not prepared to say that that was the true construction of the agreement; he should rather say that it was confined to personalty: but that on which he had a very strong impression was as to the mode of calculation adopted with regard to the bequests. The result of his Honor's decree on that point was, that whatever the most favoured person received in personalty or realty, as much should be given to the niece; so that whatever was given to the nephew would be suddenly taken away from him and given to the niece, who getting this in addition to what she had before, would therefore take nearly the whole. He was not prepared to put a construction on the agreement that would produce such a result. Lord Plunket entirely concurred with the Lord Chancellor, and he expressed doubts upon all the points decided by the Vice-Chancellor, viz, the extending of the agreement to the real estate; the transfer of the 57,000 *l.* stock; and lastly, in what way the fund should be distributed, and how to give effect to the contract. It was

impossible, he observed, to say on this contract, though no doubt a great benefit was intended to be given to the niece, no greater benefit indeed to any person than to her; still it was impossible to say that it was intended she should get all: at least he thought so at present. But if that should in the end be considered to be the effect of the contract, their Lordships must see it carried into execution. The Lords ordered a second argument, after which Lord Brougham, C., moved a partial reversal of both the original decree and the decree upon further directions (I). The arguments are not reported. I have a full note of them: they turned principally on the three points—1. That the agreement did not embrace realty; to which it was answered that if it did not, yet purchases and testamentary dispositions of realty could not be made in fraud of the agreement. 2. That the interest of the nephew in the 57,000 *l.* stock was only in effect for life with the contingency of survivorship, and that in the event which had happened of his dying first, the stock had survived to the wife; to which the reply was that the event was unimportant, for under the bequest the nephew could have disposed of the whole of the stock as he pleased, and therefore the bequest for the purposes of the agreement was to be deemed equivalent to a gift to him solely. 3. That the Vice-Chancellor had not executed the agreement; but in effect substituted the person entitled under it for the largest legatee. On the other side it was contended that the decree followed the agreement literally, and when the amount was ascertained it was admitted to be a debt, and therefore was to be paid before mere legacies.

Lord Brougham, C., and Lord Plunket concurred in opinion. They assumed that *the half* of the share the nephew would be entitled to would be equal to the greatest legacy or benefit given to any other person. They thought

(I) The speeches and a full note of the judgment are in 7 Bligh, N.S. 45; they are not in 1 Cla. & Fin., and the statement there of the decrees having been confirmed does not except some important matters.

that the agreement was confined to gifts of personal property, but they held it not to be necessary to decide this point, because they thought the purchases and dispositions of the real estates were in fraud of the agreement, and therefore they were to be considered in estimating the value of what had been given by testamentary dispositions to the nephew. They held the decree of the Vice-Chancellor to be erroneous as to the 57,000 *l.* stock, as equity would have restrained the nephew to an interest during the joint lives of himself and his wife, with the chance of survivorship, in support of which view the cases of Richards *v.* Chambers, 10 Ves. 580, and Parker *v.* Brook, 9 Ves. 583, were relied upon, and the decree of the Vice-Chancellor was considered as inconsistent with itself in this respect (I). They held the original decree to be wrong in declaring the parties under the agreement entitled to claim so much as would be equal in value to the largest amount bequeathed to any person or legatees, whether specific or pecuniary, or *residuary legatee*, for that would in effect be to make the claimant the residuary legatee. They considered that to make the claimant's portion equal to the largest legatee's, the former must take as much as the latter, and that for this purpose the value of the gifts to the largest legatee should be ascertained, and then the whole sum should be divided into two, and one moiety be given to each: in that manner the contract was substantially and properly executed, because no person would get a greater amount in value than the party under the agreement. The decree of the Lords accordingly declared, 1st, the dispositions of the personal estate were to be

(I) The Vice-Chancellor's decree, in this respect, seems to be consistent; but the mode of valuation adopted by the Lords, viz. according to the way in which the legacy or gift would go if the husband did no act to disturb its destination, clearly effected the intention without disturbing the rights of the husband and wife as between themselves. But the cases quoted do not touch the point whether equity would have restrained the husband from disposing of the stock, and that point cannot be considered as settled by this decree.

considered as bequests. 2d. That in estimating the value of the nephew's interest in the 57,000 *l.* stock, the Master was to ascertain the value of his interest during the joint lives of him and his wife, and of his contingent reversionary interest, and such sum was to be considered as a bequest to the nephew. 3d. That the real estates in question ought for the purpose of the agreement to be considered as personal estate, and as if made the subject of testamentary disposition, *and to be dealt with as part of the residue in so far as the nephew's interest was concerned.* 4th. That the Master was to compute what at the testator's death was the value of the benefits (*other than any share of the residue*) given to the nephew, having regard to the declarations in the original decree and in this order. 5th. That the plaintiff was entitled to a sum equal to the amount of the greatest sum taken by any legatee, either under any actual bequest, or under any disposition therein directed to be considered as a bequest, and that if the nephew had such greater share, the plaintiff's demand was for an equal share to his. 6th. That the plaintiff's was a debt by specialty, and as such entitled to priority over both the simple contract debts and the legacies, whether residuary or otherwise; and that the whole of the property disposed of by the will under the description of residue was applicable to discharge such debt to the plaintiff; and if that fund should not be sufficient, then that the shares of the nephew and his wife were liable for satisfaction of this claim to abate in proportion to the amount of the benefits taken by them under the will, or by gifts in which the testator retained any interest during his life. And 7th, that *all the clear residue, after making satisfaction to the plaintiff as therein directed, was divisible between the nephew and the plaintiff.*

6. This, although it appears to be a very simple case, was in truth one of very great difficulty. The question upon the transfer of the 57,000 *l.* stock to the nephew and his wife jointly was one of great difficulty—whether the nephew,

for the purposes of the agreement, was to be considered as a legatee of a moiety only, or whether, looking to his interest in his marital right, he was to be held to be the legatee of the whole. This was a point upon which Lord Eldon long doubted, and I am not sure that he ever made up his mind upon it one way or the other. The House of Lords treated the gift as if it had been to the husband for the joint lives of himself and his wife, and after the decease of the one first dying, to the survivor absolutely. Notwithstanding the doubts expressed as to the decision of the Vice-Chancellor in regard to the real estates, his decree but followed out Lord Eldon's on this point, and was ultimately affirmed by the House, although perhaps on a different ground, and was even carried further, for the purchased estates were declared to be personal estate, and were to be considered as such, as part of the residue given to the nephew. The direction in the Vice-Chancellor's decree, which it would have been difficult to maintain, that for payment of the claim the general personal estate should be the first fund, the specific legacies the second, and the real estates the third, was in effect reversed, and the residue (including the real estate as personalty) was to be the first fund, and the *shares* of the nephew and his wife [that is of course the several gifts to them] were to be the next fund, and they were to abate in proportion. But although the obligees of the bond were to rank as specialty creditors, and as such were to have priority over both the simple contract creditors and the legatees, yet the direction as to the funds which were to answer the demand does not seem to meet the justice of the case between the other legatees and the nephew and his wife. This was owing to those parties not being before the Court, so that no contribution could be sought for against them. It was so stated in argument at the bar of the House of Lords. The claim, therefore, was considered in effect as against the nephew, whose legacy, it was assumed, was in the whole double the amount what any other legatee

would take; and he was to divide the value of the property which he took between himself and the claimant. This should be kept in view in applying this case to any other of a like nature. The judgment of the Lords appears to have done justice to the parties, whilst it gave full effect to the real meaning of the agreement. It was very difficult to maintain the original decree.

7. Where a provision for the intended wife under a settlement before marriage was declared to be as and for her jointure, in full lieu, bar, and satisfaction of any dower or thirds which she could or might claim *by common law* out of all or any of the estates real *or personal* or freehold which the intended husband then was or at any time thereafter should become seised of or entitled to, it was held that the wife surviving was barred of her claim on her husband's personal estate under the Statute of Distributions, and that decision was affirmed in the House of Lords. Lord Lyndhurst, C., thought that the words "common law" could not be interpreted in this passage in their strict sense, and as contradistinguished from statute law, because in that case they would be altogether insensible. The words "common law," in this passage, must be construed as equivalent to the terms "according to the general law," according to law, as distinguished in ordinary parlance from equity, and unless they put this construction on the clause, the word "personal," which was contained in it, would have no effect or meaning whatever. The law Lords concurred in this view (*h*).

III. *Of limitations and covenants in settlements.*

1. The great case of Cholmondeley *v.* Clinton (*i*) was decided upon the old Statute of Limitations, but a question arose upon a settlement by Lord Orford, which recited his desire that the estate should continue and remain in the family and blood of Samuel Rolle (his maternal grand-

(*h*) Gurly *v.* Gurly, 8 Cla. & Fin. 743. (*i*) 4 Bligh, N. S. 1.

father, by whom the estate had been previously settled), and which expressed the consideration to be, natural love and affection for his relations the heirs of Samuel Rolle, and to the intent that the estate might remain, continue, and be in the family and blood of his late mother, the Countess of Orford, on the side or part of her father, Samuel Rolle; and the uses were to Lord Orford himself for life, remainder to the heirs of his body, remainder as he should appoint (which power was not exercised), and in default of appointment, "to the use of the right heirs of the said Samuel Rolle for ever." Lord Orford was at that time the right heir of Samuel Rolle, and the question was, whether the limitation was in effect to himself, or whether it vested in the person answering the description of right heir of Samuel Rolle when the previous estates determined. Sir Wm. Grant, Master of the Rolls, held that the remainder vested in Lord Orford himself (*k*), but he sent a case to the Court of King's Bench, three of the Judges of which court certified in accordance with his opinion, and the fourth Judge certified that the remainder vested, according to his opinion, in the person who was heir when the previous limitation failed (*l*). Sir Thomas Plumer agreed with this latter opinion (*m*). Upon an appeal to the House of Lords, Lord Eldon, C., and Lord Redesdale, avoided giving any opinion upon this point. The true construction of the limitation, therefore, received no elucidation from the judgment of the House.

2. Although in general a limitation in a settlement of even the equitable estate to the right heirs of the settlor is deemed of the same quality as his old reversion, and would descend accordingly, yet where the direction is upon a given event to convey the fee to the settlor's right heirs,

(*k*) 2 Mer. 173.

(*l*) 2 Barn. & Ald. 625.

(*m*) 2 Jac. & Walk. 1. See Wortham *v.* Mackinnon, 4 Sim. 485; 8 Bing. 564.

the persons who, at the happening of the event, fill that character, will be the parties entitled.

3. Thus in Bush *v.* Locke (*n*), a man seised in fee of an estate according to the custom of a manor, covenanted on his marriage to convey it to trustees in fee, upon trust after the marriage for himself for life, then for his intended wife for life, and after the death of the survivor of them the trustees were to surrender the same to the use of such children of the marriage, for such estates, &c., as the husband, or, in default of appointment by him, as the wife should appoint, and, in default of appointment, to the use of all the children, or the only child, in fee, according to the custom: and in default of issue of the husband or the wife that should be living at the death of the survivor of them, the trustees were to surrender the estate to the use of the right heirs of the husband for ever, according to the custom. There was but one child of the marriage, who survived her father, but died in the lifetime of her mother, without having been married. It was decided by the Vice-Chancellor that the customary heir *at the time of the death of the mother* (she having survived her husband) was entitled to a surrender from the trustees as being then the customary heir of the settlor. This decision was affirmed by Lord Brougham, C., and afterwards in the House of Lords upon his advice.

4. In Cole *v.* Sewell a question arose upon the validity of a contingent remainder which, it was contended, was too remote, and therefore void (*o*). By a settlement in 1752 Peter Daly, having three daughters, settled an estate to the use of himself for life, with remainder to trustees for 99 years, with remainder to the use of the three daughters for their lives as tenants in common, with remainder to trustees,

(*n*) 9 Bligh, N. S. 1; 3 Cla. & Fin. 721; 1 Myl. & Cra. 411, *nom.* Locke *v.* Southwood. See Locke *v.* Coleman, 1 Myl. & Cra. 423.

(*o*) 4 Dru. & War. 1. See Williams *v.* Teale, 6 Hare, 239.

to preserve contingent remainders, with remainder to the use of the respective first and other sons of the respective three daughters successively in tail male, with cross-remainders between them, and to their sons in tail male (*p*); and in case the three daughters should die without issue male, then as to their respective portions to the use of their respective daughters as tenants in common in tail; and in case any one or two of the three daughters should die without issue, then as to the shares of such daughter or daughters so dying without issue, to the use of all the daughters of such survivor or survivors, as tenants in common in tail; and in case the three daughters should die without issue, to certain other uses in strict settlement, with remainder to the right heirs of Peter Daly. It was insisted that the limitation over, in the event of the death of any of the daughters of Peter Daly without issue, was void for remoteness; and this limitation was treated not as a remainder at common law, but as a shifting or secondary use. A case was sent to the Common Pleas in Ireland, and they certified in favour of the limitation (*q*). This certificate was resisted before Sir E. Sugden, C., but he confirmed it. The question, he said, depended upon this: the first limitation being only to the issue male of the daughters, which of course would not include issue female of the sons of the daughters and the next limitation, although to the daughters of the daughters in tail, not exhausting the whole line of the issue of the daughters, the gift over was beyond the natural termination of the preceding limitations, because the gift over was only to take effect in case of the daughters dying without issue of their bodies generally, and there was no preceding limitation embracing the whole line of the daughters' issue. He thought that the case of Jack *v.* Fetherstone (*r*) was an authority in favour of the validity of the limitation as a contingent remainder. It was said,

(*p*) Vide *infra*.
(*q*) 5 Ir. Law Rep. 197.
(*r*) 2 Hud. & Bro. 320.

however, that in the present case this was not a contingent remainder, but a future, or secondary, or springing use, and being to take effect in default of issue generally, it was too remote, and therefore void. If there were one rule of law more sacred than another, it was this, that no limitation should be construed to be an executory or shifting use which could by possibility take effect by way of remainder. As to the question of remoteness, the Chancellor said, at that time of day he was surprised to hear it pressed upon the Court, because it was then perfectly settled that where a limitation was to take effect as a remainder, remoteness was out of the question, for the given limitation was either a vested remainder, and then it mattered not whether it ever vested in possession, because the previous estate might subsist for centuries or for all time, or it was a contingent remainder, and then by the rule of law unless the event upon which the contingency depended happened, so that the remainder might vest *eo instanti* the preceding limitation determined, it could never take effect at all. The difficulty in the old law he considered was removed by the modern rule against perpetuities. In the case of a contingent remainder the event might or might not happen before or at the instant the preceding estate was determined, and the limitation would fail or not according to that event. It might thus be prevented from taking effect, but it could never lead to remoteness. The objection therefore could not be sustained against the validity of a contingent remainder. If the remainder over had been regularly in default of issue male of the daughters, it would have taken effect when and if that failure had happened. Now the remainder over was in default of issue generally, but it could only take effect when and if there was a failure of issue male, that is, upon the regular determination of the previous estate: there was no distinction in point of perpetuity between the limitations; either could only take effect at the same period. The simple distinction was, that

although the event happened, the latter gift—depending upon the contingency—might never take effect, but that introduced no question of remoteness. This limitation appeared to him to be one of the most regular technical contingent remainders that could be conceived. The estate was first limited to the daughters for their lives, with remainder to their sons in tail male, with remainder to the daughters of the daughters in tail general, and then if the daughters die without issue, remainder over. What could be more regular? If the remainder over took effect at all it must take effect immediately upon the natural determination of the preceding estates; for if at the time of failure of issue male there should also be a failure generally of their issue, then the preceding limitations were subsisting up to the time at which the contingent remainder over was limited to take effect, and were only exhausted at that moment; and supposing that at the determination of these preceding limitations there were other issue of the daughters—issue female of their sons, for instance, who do not take estates under those preceding limitations, then the contingency does not happen upon which the remainder was to take effect, although the preceding estates are determined, and the remainder over is consequently destroyed. The limitation plainly fell under Mr. Fearne's second class of contingent remainders. Mr. Fearne put a case from Leonard: "So if lands be given to *A* in tail, and if *B* come to Westminster Hall such a day [remainder] to *B* in fee. Here *B*'s coming to Westminster Hall has no connexion with the determination of *A*'s estate, but as it was an uncertain event, and the remainder to *B* is not to take place unless it should happen, such remainder is therefore a contingent remainder." What is that, the Chancellor asked, but a regular limitation after the determination of the preceding estate, but depending upon a collateral event? Was not that exactly this case? The limitation here was to a particular class of the issue of the daughters, and a gift over if

the daughters died without issue generally. The contingency here then was the death of the daughters without issue. Was there any objection to the nature of that contingency? The previous estates were to continue until their natural determination; the remainder over depended on an event collateral to the determination of the previous estates. The nature of that collateral event was unimportant. Whether it were a dying without issue, a particular tree standing or falling, a party coming to Westminster Hall, or whatever were the event on which a man in his caprice might choose to rest the contingency upon which the limitation over was to take effect, was perfectly indifferent. The Court then observed that the old rule rendered void successive life estates to successive unborn classes of issue, and that in Nicholls *v.* Sheffield, 2 Bro. C. C. 215, it was held that a proviso for shifting an estate after an estate tail was valid; and Lord Kenyon would not listen to an argument grounded on remoteness, because the limitation over might at any time be barred by the previous tenant in tail.

5. It has been observed by a learned writer (*s*) that the doctrine advanced in Cole *v.* Sewell was not necessary to the decision, as there the contingent remainder was preceded by estates tail, the owners of which might have destroyed it, and therefore the remarks of the Chancellor might fairly be considered as extra-judicial; and it is contended that the remainders are still open to the objection of remoteness (*t*). In the judgment referred to, the circumstance that the remainders objected to were after previous estates tail, was relied upon, and Nicholls *v.* Sheffield was referred to; and the rule was admitted to be a continuing one, which forbids the creation of successive life estates to successive unborn classes of issue. So far the old law was admitted to operate; but the object of the Court seems to

(*s*) 2 Jarm. Wills, 727. See Lewis on Perp. 663.

(*t*) See Lewis on Perp. 408.

have been to show: 1. That the limitations in question were remainders; and 2. That although as springing uses they might be open to objection, yet as contingent remainders they were free from objection: they were not limited upon an event that could not happen until after the preceding estate determined, but only in such a way that the event might not happen before the determination of that estate, and in the latter case they would not take effect (*u*). The limitation was not within the old rule, forbidding the providing for a possibility upon a possibility; but the objection simply was that it was not so limited in its creation as to follow the preceding limitation in a regular course of limitation, depending upon no other contingency than the coming into *esse* of the person intended to take.

6. Upon an appeal to the House of Lords from the decree affirming the certificate of the Court of Common Pleas, the decree was, upon the motion of Lord Cottenham, C. supported by Lord Brougham, affirmed with costs (*x*).

7. In this case of Cole *v.* Sewell, another point of importance was decided by the Court of Common Pleas, and adopted by the Chancellor. The cross remainders were to the daughters of the *survivor or survivors* of the three daughters, in case any one or two of them should die without issue; and it was held that although the limitation was in a deed, survivors were in favour of the intention to be construed "others," according to Doe *v.* Wainewright, 5 Term Rep. 427. The Chancellor observed that the settlor was looking to the event on which the estate was to go over, but he certainly did not mean that the circumstance of one of his daughters being actually alive at the time of the death of another without issue, should be the event upon which was to depend the taking effect of the limitation in words to the survivor and her issue. He expressed his approbation of the rule of construction adopted in Doe *v.* Wainewright, and observed that there was no magic in

(*u*) See 2 Prest. Abstr. 168. (*x*) Printed Cases, August 1848.

words, and the intention was perfectly evident. Upon the appeal to the House of Lords the decree, as we have seen, was affirmed (*y*).

8. A trust simply for *the next of kin*, without more, cannot be deemed to mean next of kin entitled, in case of intestacy, under the Statute of Distributions, but means those who are nearest in proximity of blood. This was decided in Withy *v.* Mangles (*z*), where 10,000 *l.* was to be provided by the father of the intended husband; and the trusts of the settlement were for the wife for life, then to the husband for life, and then (subject to appointment) for the child or children of the marriage, to sons at 21, and to daughters at 21 or marriage. And in case there should be no son living to attain 21, and no daughter living to attain that age, or be married, the 10,000 *l.* was to be in trust for such of the brothers and sisters of the wife, or any of their issue, as she should appoint (but which power she did not exercise), and in default of such appointment upon trust for such person or persons as at the time of her death should be her next of kin. There was an only child of the marriage; the mother died a few days after its birth, and the child died a few days after her, leaving his father and his mother's father and mother surviving him; and it was decided by Lord Langdale, Master of the Rolls, that the fund vested in the child and in the grandfather and grandmother *as joint tenants*. The House of Lords affirmed this decision, upon the advice of Lord Cottenham, with the reluctant assent of Lord Campbell. It will be observed that the circumstance that the trust for the next of kin was only in case there should be no child who should become entitled under the trusts, was held not to preclude the infant son from taking with the others as next of kin: he did not become entitled under the trusts for the children, because he died under 21, but he did become entitled at his mother's death, although only a few days old, to an interest in the joint tenancy, as one of the

(*y*) 21 August 1848. (*z*) 4 Beav. 364; 10 Cla. & Fin. 215.

three next of kin. The settlors could hardly have been aware of the legal construction of the words which they used, but now that their meaning is settled it is not probable that a similar mistake will be made in a settlement.

9. Where an estate is settled upon marriage expressly subject to certain incumbrances, it must of course bear these charges in exoneration of the settlor, and even if the debts were personally contracted by the settlor, and were not a charge upon the settled estate, yet that estate must discharge them and exonerate the settlor and his personal estate therefrom.

10. This was first decided otherwise in Vandeleur *v.* Vandeleur (*a*), in Ireland, by Lord Plunket, C. The estates in question were conveyed by Mr. Vandeleur previously to his marriage, in consideration of the lady's portion and of the marriage, to the usual uses in strict settlement; and it was provided that all the estates conveyed should in the first place stand and be charged and chargeable, and the same were thereby declared to be charged with the portions due to the settlor's brothers and sisters, and also with the judgments and bonds thereinafter mentioned, and which sums were set forth in a schedule, and amounted to 12,700*l.* In the covenants for title, the one for freedom from incumbrances excepted the jointure of the settlor's mother, and the sums amounting to 12,700 *l.*, and the portions "with all and every of which said several sums the said lands and premises are hereby charged," and the covenant for further assurance concluded with "except as before excepted." The greater part of the 12,700*l.* consisted of portions and sums which never were debts of the settlor, but 5,100*l.*, part thereof, consisted of debts incurred by himself and secured by bonds and warrants of attorney, upon some of which judgment had been entered up, and there was also a debt of his own due to one Brown. The

(*a*) 3 Cla. & Fin. 82; Llo. & Goo. t. Sugd. 241, n., and see Alen *v.* Hogan, Llo. & Goo. 231.

Lord Chancellor of Ireland decreed that 5,100*l.* was to be paid out of the settlor's personal estate as the primary fund for the payment of the same. Upon an appeal to the House of Lords, Lord Plunket, being present, said that he had felt doubtful when he made the decree whether it was right or not, and it was reversed upon the advice of Lord Brougham, on the ground that the persons claiming under the settlement could take only subject to the charges which had been made upon it by the settlement. They took what would remain after satisfying the charges.

11. Lord Brougham, in delivering his opinion, said that there seemed some reason to hold that, even regarded as the case of volunteers, the personalty might be held to be exonerated in the peculiar circumstances of the settlement. But he relied upon the circumstance that the son of the settlor claimed as a purchaser. This is a point upon which no doubt can be entertained. It depends upon the intention of the settlor, as collected from the face of the instrument, to settle the estate only subject to the charge, and this intention must prevail whether the settlement be voluntary or for valuable consideration; if there be a distinction it is against the volunteer, for he can only take what is given to him; he has no contract to fall back upon. It may be useful to caution the student against supposing, from a cursory perusal of the report, that the settlor, after such a settlement, cannot if he pleases pay off any of the debts and declare such payments to be in ease of the settled estates (I). The settlor in the above case paid off his own personal debt to Brown, and also parts of the other debts and portions, and declared that such last-mentioned payments should be in ease of the settled estates, and by his will he directed that the judgment entered on Brown's bond should be satisfied by his executors, the same having been paid: and the decree in Ireland declared that

(I) See the head note, 3 Cla. & Fin. 82.

all those payments were made in ease of the estates which were discharged therefrom, and there was no appeal from that part of the decree. Lord Brougham observed that it seemed impossible to allow this demand on the equities of the parties to be affected by anything that was done by the settlor after the marriage. All rights must be taken to be as they were established at the date of the conveyance, otherwise a party might alter the rights of others by things done after the contract was completed. This means not that the payments made by the settlor and testator did not operate to exonerate the estates according to his declarations in his lifetime and direction in his will, but that such acts and declarations could not affect the construction of the settlement in regard to the debts which he had left undisturbed. It was not, I may observe, in conclusion, alleged that the portions and debts not created by the settlor were in any manner a charge on his assets.

12. In Conolly *v.* M'Dermott (*b*), it was insisted upon the appeal that a large portion of the estates in the settlement was not limited to the issue. The estates conveyed by the settlement were estate A, held in fee, and estate B, held for lives, and C, held for years, and after making provision thereout for the settlor's debts and for an annuity to his wife, the uses were declared as to A (the fee-simple lands), to the use of William Kelly for life, remainder to trustees to preserve *the contingent uses thereinafter limited thereof* [and as to B (the freehold for lives) and C (the leasehold for years), for William Kelly for life], and after his decease to the use of his children as he should appoint, and in default of appointment to them with limitations over, and as to B and C, for William Kelly for life, and after his decease for his children, in effect as before, with like limitations over, but intended to be adapted to leaseholds for lives and years. The settlement contained a power to William Kelly and the other tenants for life named in the settlement in the limita-

(*b*) Beat. 601; Printed Cases, D. P. 1824, 1825; *infra*, Powers.

tions over, *when in possession by virtue of the limitations aforesaid*, to grant leases of the land whereof the settlor *was seised in fee*, and to lease the freehold lands. It was insisted in the reasons for the respondents that the fee simple, which were the principal lands mentioned in the settlement of 1769, were not limited to the issue of William Kelly, but the Lords by their decree declared that the principal lands, together with the leaseholds for lives and years, were by the settlement conveyed, after the decease of William Kelly, to the use of his children, and the uses over which were fully stated or referred to in this declaration. There could be no doubt upon the context as to the intention, although *primâ facie*, the limitations to the issue were confined to freeholds for lives and leaseholds immediately before limited to William Kelly for life. The mistake appears to have been in the *first* introduction of the freeholds and leaseholds for the purpose of giving a life interest in them to William Kelly; the second declaration of uses and trusts as to them was what the parties really intended.

IV. *Where a portion is an ademption of a legacy.*

1. Upon this head the case of Lord Durham *v.* Wharton (*c*) is an important authority. General Lambton was seised in fee of estates, devised to him by his brother, charged with 5,000 *l.* for his daughter, afterwards Mrs. Wharton, and the will authorized the interest to be raised for her maintenance, if the General should so direct. The latter, by his will in 1788, gave 10,000 *l.* to trustees, one-half to be paid at the end of three years, and the other half at the end of six years after his death, with 4 per cent. interest from his decease, in trust for his daughter for life, and after her decease in trust for her children as she should appoint by deed or will, and in default of appointment for all the children equally, with the usual vesting clauses; and if she

(*c*) 3 Cla. & Fin. 146; 10 Bligh, N. S. 526; 5 Sim. 297; 3 Myl. & Kee. 472.

should have no child, or her sons should die under 21, and her daughters under 21 and unmarried, the 10,000 *l.* was to fall into the residue of his personal estate, and he declared that that sum was in addition to the sum to which she was entitled under his brother's will. Upon the marriage of his daughter, in 1790, the General agreed to advance 15,000 *l.* as a marriage portion. The intended husband covenanted to make a provision out of his estates for pin-money, and a jointure for the wife, and portions for the younger children, and the General covenanted that if such settlement should be made in his daughter's lifetime, or she should die in her intended husband's lifetime, he would pay the 15,000 *l.* to the husband as and for the marriage portion of the daughter, and interest in the meantime, and the 15,000 *l.* was made a security for the performance by the husband of his covenant; and it was declared that the portion was in satisfaction of all sums which the daughter could claim under her uncle's will. The settlement was executed, and the 15,000 *l.* portion paid to the husband. The General died in 1794. The V. C., Sir John Leach, (after a great lapse of time, which the plaintiff accounted for by an allegation that the daughter was ignorant of the legacy given to her by her father's will,) held that the daughter's legacy was not satisfied by the advancement, and gave her interest from the testator's death, and this decree was affirmed by Lord Brougham, C.; but upon an appeal to the House of Lords the decrees were reversed upon the advice of Lord Lyndhurst. He remarked upon the delay, and thought that the presumption was that the daughter must have known at or soon after her father's death that the legacy was bequeathed to her. It was said that the sums were not equal, because 2,000 *l.* was alleged to be due for interest on the 5,000 *l.*; but that did not appear to him at all to affect the case. It was not necessary in order to raise the question of ademption that the sums should exactly correspond. There were many cases in which the proportional difference was much

greater than was supposed to have existed in the present instance. But in truth there was no evidence that any such arrear was due, nor could it be ascertained that any such arrear existed. Upon the important points in the case, viz.:—1st. That the limitations under the will were widely different from the limitations under the settlement, he apprehended that this would not prevent the application of the principle of ademption, and that the authorities were all the other way (I), and after examining them he added that he conceived that the circumstance of the limitations being different did not at all affect the question. 2d. That the settlement made the advancement a satisfaction of the claims under the brother's will, but was silent as to the General's will: he had never felt the force of the argument. It was necessary, as far as related to the debt, that the provision in satisfaction of it should be in terms expressed; but as far as related to the provision of the will, it was not necessary, because that effect was produced by operation of law. In conclusion, he thought that the general rule of law ought in this instance to prevail.

2. There could be no fair doubt of the intention in this case to adeem the legacy under the father's will; but the difficulties in law were of great weight. The 15,000*l.* was paid to the husband, and, in truth, was not settled at all on the children, although, in consideration of it, pin-money, and a jointure, and portions for the younger children were provided; and even the trusts in the will of the 10,000*l.* for the children, and the trusts in the settlement to raise portions for the *younger* children, were dissimilar (*d*). These difficulties were overcome, and the substance of the case was regarded. The daughter was *entitled* to 5,000*l.*, and the father had by his will provided an additional 10,000*l.*,

(*d*) See the argument, 5 Sim. 312.

(I) Monck *v.* Monck, 2 Ball & Beat. 298, was referred to as a decision by Lord Redesdale; it was decided by Lord Manners.

he therefore intended her portion to be 15,000*l.* Upon her marriage he accordingly advanced 15,000*l.* for her portion, declaring it to be a satisfaction of the debt of 5,000*l.* This certainly did not prevent the advancement from operating also as an ademption of the 10,000*l.* legacy under the father's will. It would be found difficult to reconcile the decisions on this head previously to the decision in the Lords, and I do not think that the latter has been always kept in view by the courts since it was pronounced. It is, of course, a binding authority, and as the principles upon which it was decided are plain, and highly favourable to the real intention in such cases, it ought to be strictly followed. Having now a clear rule we ought not lightly to depart from it.

3. And here we may introduce a case where, in favour of the intention, a provision by will was held to be a satisfaction of so much of a portion on marriage as was secured by bond, notwithstanding important differences in the limitations of the two funds. I allude to Lord Glengall *v.* Thynne, to which our attention has already been called upon another point (*e*). Mr. Mellish, previously to the marriage of one of his daughters with Lord Edward Thynne in 1830, in consideration of the provision made by the Marquis of Bath for his son, transferred 33,333*l.* 6*s.* 8*d.* consols to trustees, and executed a bond to them to secure the payment of 2,000*l.* a year during his life to them, and the transfer to them upon his decease, in case his daughter or any child of the marriage should be then living, of 66,666*l.* 13*s.* 4*d.* consols. The trusts were declared to be of the stock transferred for the husband for life, then for the wife for life, and then in trust for all or one or more of the children of the marriage, as the husband and wife should by deed appoint, and in default of appointment, as the survivor should by deed or will appoint, and in default of any appointment, in trust

(*e*) *Supra*, p. 56; 1 Keen, 769; 5 Beav. 245; Printed Cases, D. P. 1848. The trusts are not quite accurately stated in 1 Keen.

for the sons who should attain 21, and the daughters who should attain that age or marry with consent. And the trusts of the 2,000*l.* a year and the 66,666*l.* 13*s.* 4*d.* were declared to be for the daughter for life (for her separate use during the coverture), and after her death, in trust for the children of the marriage, as the parents should jointly appoint, and in default of such appointment, for all the children, who being sons should attain 21, or being daughters should attain that age or marry with consent, equally. If there should be no children, or none who should acquire vested interests, then the stock transferred should, after the decease of the survivor of Lord Edward Thynne and his wife, and such failure of issue as aforesaid, and the said annuity of 2,000*l.* and the stock to be transferred, should, after the decease of the wife and failure of issue as aforesaid, and whether Lord Edward should or should not be then living, severally be in trust for Mr. Mellish, his executors, administrators, and assigns. In 1833, after the marriage, Mr. Mellish, by his will, after devising real estates to each of his two daughters in strict settlement, gave the residue of his personal estate to trustees, as to one moiety, in trust to pay the interest to his daughter, Lady Edward Thynne, for her life for her separate use, remainder to the children of his said daughter, in such shares as she should by deed or will appoint, and in default of such appointment, to such children equally, sons to take vested interests at 21, and daughters at that age or marriage; and in default of such issue, to his other daughter and her children. Lord Langdale, Master of the Rolls, held that the bequest of the share of the residue, which exceeded the value of the stock secured by the bond, was a satisfaction of the bond. As to the gift being of a residue, that, after the previous decisions, presented no difficulty. The real difficulty arose upon the conflicting interests under the two gifts, which it was insisted were sufficient to rebut the presumption against double provisions. The difference between

the different limitations for the benefit of Lady Edward Thynne appeared to him to be immaterial. The difference between the different limitations for the benefit of her children was more important. The sum settled was limited for the benefit of the children of the marriage, and subject only to the joint appointment of their parents. The share of residue bequeathed was limited for the benefit of all the children of the daughter, and subject to her appointment only. But the principle on which the Court proceeded in cases of this nature was, he apprehended, correctly stated by Sir John Leach in Weall *v.* Rice, 2 Russ. & Myl. 267, that if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed that he does not mean a double provision; but this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence (*f*). The question here was, whether the two provisions were of a nature so different as to afford any evidence in favour of a double provision, and, on the whole, it appeared to him that they were not. Upon an appeal from this decree to the House of Lords, the differences between the two sets of limitations were particularly relied upon, but the decree was affirmed, with costs to the respondents in the opposite interest.

4. In Wharton *v.* Lord Durham the legacy was held to be adeemed by the marriage portion, and the legacy therefore, although given to the daughter and her children, wholly failed, and the children could claim under the settlement only: there could be no conflict. But in Lord Glengall *v.* Thynne the legacy was held to be a satisfaction of the previous settlement, under which the children of the marriage were entitled as creditors and purchasers, and therefore in events which might happen conflicting interests might arise. The Court did not enter into the considera-

(*f*) See Hall *v.* Hill, 1 Dru. & War. 130.

tion of these difficulties, but they were met by the decrees and orders made in the cause. Lady Edward Thynne had no issue. The decree declared that the bequest to her and her issue was to be considered as a satisfaction, or in lieu of the provision made for them by the bond, and the Master was to inquire whether it would be for the benefit of her and her issue (if any) to elect to take under the provisions of the bond or the will. The Master found that it would be for the benefit of Lady Edward and her issue (if any) to elect to take under the will, and not the bond, and accordingly it was decreed that she ought so to elect on behalf of herself and her issue, and that she and her issue (if any) were entitled to the provisions of the will, and not of the bond. This put an end to all chance of conflict: for the children of a future marriage of the daughter could claim only under the will, and they could not object to the other children electing to take with them what the testator had provided for all of them. The children of the marriage having by force of the decree in effect elected to take under the will, of course could not resort to the bond: the trusts declared of the portion secured by it for them thereupon ceased, and the will alone regulated their interests in the fund which it provided for them in lieu of the bond. The case would not have been free from difficulty if the election had been to take under the bond.

5. In the late case of Evans *v.* Scott (*g*) a question of considerable difficulty was decided upon a clause of survivorship and accruer of portions provided for children out of real estates, who did not live to want them. The wife's estate was settled after marriage to the husband for life, then to the wife for life, then to trustees for 500 years, to commence from the decease of the survivor of the husband and wife, remainders over in strict settlement. The trusts of the term were: 1. After the decease of the survivor of the husband and wife, by the usual means to raise 1,000*l.*

(*g*) 1 H. of L. Cas. 43.

for the portion of each and every the daughter and daughters, younger son and sons of the husband by the wife; the portion or portions of a younger son or sons to be paid at 21, and the portion or portions of a daughter or daughters at 21, or marriage, which should first happen, *if such respective ages should be attained, or marriage had, after the decease of the survivor of the husband and wife, and not sooner.* 2. And in case any younger son or sons should die before 21, or become an eldest or only son before 21, or if any of the daughters should die before 21 or marriage, *or before his, her, or their portion or portions should become vested,* then the portion or portions thereinbefore provided for such younger son or sons so dying, or becoming an eldest or only son, and for such daughter and daughters so dying, and unmarried, before his or their *portion or portions should become payable as aforesaid,* should go, survive, and accrue *to the survivors and survivor* of such daughters and younger sons, equally to be divided between them, and to be paid and payable at the same time or times as his, her, or their original portion or portions was or were thereinbefore directed to be raised and paid, or should become payable as aforesaid. And if any other of the children, being a son, should die, or become an eldest or only son, before the times or ages aforesaid, or, being a daughter or daughters, should die unmarried before the said age or ages, then such surviving or accruing portions should, from time to time, be again subject and liable to the same or the like right of accruer or survivorship to and amongst the remaining child and children, as thereinbefore was expressed, touching his, her, or their original portion or portions. 3. Provided that, in case any or either of such younger sons or daughters should happen to die in the lifetime of the husband and wife, or after the decease of the survivor of them, *before his, her, or their portions should become due and payable,* leaving issue, then such child and children to be entitled to have and take the share or shares, portion or portions, as his, her, or their

parent or parents would have been entitled to, if living, in equal shares, if more than one, and if but one, he or she to have the whole, subject to the like clauses of survivorship or right of accruer. 4. And upon further trust, after the decease of the husband and wife, out of the yearly issues and profits, to raise and pay for the maintenance and education of all and every the said younger son and sons, daughter and daughters, entitled to such portions as aforesaid, or the issue of such son or sons, daughter or daughters, who should then be entitled thereto as aforesaid, interest for their respective portions, at five per cent. until his, her, or their *original* portion or portions should become payable by virtue of the settlement; and to permit the remainderman to receive the residue of the rents. 5. Provided also, that the term should cease after raising and payment of the portions, or payment of them by the remainderman; *or in case there should not happen to be any younger children, or the issue of any of them, living at the time of the decease of the survivor of the husband and wife.* The deed contained a power to the husband and wife to raise 10,000*l.* for such purposes as they should appoint, and a power to raise 10,000*l.*, for the advancement and benefit of the younger children, in addition to the provision under the 500 years' term. When the settlement was executed there were one son and one daughter living; the daughter died in the lifetime of her parents, under 21, and unmarried. Six children were born after the settlement, three of whom died in the lifetime of their parents, under 21, and unmarried. The eldest son, and the other three younger children survived both parents. The wife survived her husband, and after his death, under a resettlement, 10,000*l.* was raised for the three surviving younger children, in lieu of the 10,000*l.* provided for them by the settlement. The question, upon a bill filed, was whether the three younger children, who had long since attained 21, were entitled to only 3,000*l.*, that is, 1,000*l.* a piece, or to 7,000*l.*, that is, their original portions,

and their shares by survivorship of the portions of 1,000*l.* provided for the four younger children, who died in their parents' lifetime, under 21, and unmarried.

6. The Vice Chancellor Knight Bruce held that 3,000 *l.* only was raisable. He was of opinion that the first clause must be read as not showing an intention that any child should take more than 1,000 *l.*, and as not extending to any daughter or younger son who should die in the parents' lifetime a minor without having been married, that is, as not providing a portion for any child so circumstanced. He was not sure that the effect of the context was not so to restrict the words as to prevent them from extending to any child who *at whatsoever age* should, *whether married or unmarried*, die in the lifetime of the husband and wife without leaving issue. The next question was whether the second clause comprised or extended to younger children who should in the lifetime of the husband and wife die minors without having been married. Whatever might be thought of the words "survivors and survivor;" the words "his, her, or their portion or portions," and the words "hereinbefore provided," in this clause, seemed to him not immaterial, combined with other parts of the deed, and particularly the language of the provisions relating to maintenance (the fourth clause), where the words were "for and towards the maintenance and education of all and every the said younger son," &c. They had the effect of showing that the second clause (the accruer) was not intended to comprise or extend to any younger child who in the parents' lifetime should die a minor without having been married. Consistently with the first clause considered as standing alone, such a child could not be a child for whom a portion was intended, nor of course could such a child be within the provision as to maintenance, education, and interest occurring later in the deed, but younger children who after their parents' death should die minors without having been married must, in every possible view of the settlement, be considered as children for whom

portions were provided, although not become entitled to receive the capital or to a vested right in the capital, for the interest was made a fund for their maintenance.—Looking at every part of the instrument—but not saying whether, if either of the children who died in the parents' lifetime had so died after attaining majority, or had after the death of the parents died in minority without having been married (I), the amount available for portions would or would not, in his opinion, have been more than 3,000 *l.*—he thought that in the events which had happened, that sum was the whole amount raisable for portions.

7. From this decree there was an appeal to the House of Lords, and the decree was varied by declaring that 1,000 *l.* was to be raised for every younger child living or born after the date of the settlement, and that the portions of such of them as, being sons, died under 21, or being daughters, died under that age and unmarried, survived to the others or other of them. Lord Cottenham, C., said that the second provision was clear and unambiguous. The portions were payable, that is, became vested in each child at 21, or the happening of the other events specified. But the children in question died before any of these events, and upon such death, according to the plain words of the settlement, the portions to which they would have been entitled had they lived until such event had happened, survived to the other younger children, unless there could be found in the settlement something to show that such was not the intention of the parties notwithstanding these plain expressions. Upon the third clause the Lord Chancellor observed, that as the judgment was founded upon the supposition that as [*qu.* no] survivorship or accruer was intended upon the death of a child in the lifetime of the tenant for life, it was material to observe that in this provision the event of a death of a child in the lifetime of the tenant for life was in

(I) Unless the latter point be conceded the second clause would have *no* operation.

terms provided for, and if this provision were considered as a limitation or restriction upon the generality of the survivorship before given, the allusion to the death of the child in the lifetime of the tenant for life, with reference to such survivorship, was strong to show that the survivorship was not intended to be confined to a death after the tenant for life. It was, he said, argued that the reference to that event in this clause tended to show that it was not contemplated in the clause of survivorship (the second clause), as there was no such reference in that clause. But the answer to that was, that the provision as to survivorship was complete without it. The observations made upon the provision for maintenance, and for the cesser of the term, did not appear to him of sufficient weight to justify a construction contrary to the obvious meaning of the previous provision. As to the provision being a particular sum for each child, he did not see how it affected the argument, as it was clear that there was to be a survivorship with respect to those particular sums. The decree assumed that all the provisions for survivorship applied only to deaths of children after the determination of the estate for life, but it could not be disputed that the portions would vest in children attaining 21, or the happening of the other events specified, although the tenant for life should then be living; and the survivorship was to take place upon the death of any child before attaining 21, or such other events happening, without reference to the tenant for life, whether it was continuing or not; but if the construction assumed by the decree should be adopted, no such survivorship would take place upon the death of any child in the lifetime of the tenant for life, which would be contrary to the expressed terms of the gift. Lord Brougham and Lord Campbell concurred. The former Noble Lord also relied upon the provision in the settlement in express terms for survivorship between children before the determination of the life

estate (I). That was most material, for it showed that that was at least in one part of the arrangement in the contemplation—and expressed so to be—of the parties to this settlement, and that provision was accordingly made for the event happening.

8. We have now the facts and the grounds of the several judgments fully before us. Let us, then, consider: 1. What, upon a general view of the trusts, was the intention of the parties; 2. Whether there were sufficient words to enable the Court to give effect to the intention; and, 3. Whether the rules applicable to such a case authorized a liberal construction of the trusts. First, a glance at the trusts must satisfy a property-lawyer that the framer unhappily misapplied and misunderstood the precedents before him. There is manifest error on the face of the instrument; but the general intention is clear to provide a 1,000*l.* portion only for every younger child at the usual periods. It is, no doubt, equally clear that portions thus provided for at least some of the children were intended to be given over to the others, if such children died before the periods specified. The difficulty is to discover the class of children whose portions were thus to go over. If a settlement provide a particular sum, as in this case 1,000*l.* portion for every younger child, it is highly improbable that the portions of the younger children could be intended to be increased in consequence of the number of children born, but who should die before the periods specified, perhaps even an hour after their birth. I am not surprised that the Vice Chancellor thought it doubtful whether any child, who at whatever age should, whether married or unmarried, die in the lifetime of the parents, without leaving issue, would be entitled to a portion under the trusts, although this would be restricting the words beyond what they fairly import. But the intention pro-

(1) There does not appear to be any such clause; the clause referred to is, no doubt, that providing for substitution, viz., the third clause.

bably was not to provide for any child so dying. It appears to have been lost sight of, that the settlement contained a power to the parents (which was in effect executed) to raise portions to the extent of 10,000*l.* for the younger children independently of the trusts of the term. The parents had, therefore, ample means of providing portions for their younger children who should require advancement in marriage or otherwise in their lifetime. It would not, therefore, be surprising if, in providing small fixed portions for their younger children beyond their own control, they confined the provision to those younger children who, at their deaths, should be in their minority and unmarried. The first clause from its terms may be considered as giving to each younger child who lived to the period specified, although he or she died in the lifetime of the parents, the 1,000*l.* portion. This is as much as can be conceded, and even that view is not without some difficulty, having regard to the words at the conclusion of the clause. This construction would not *increase* the portion of the other children. Now, the second clause, the provision for survivorship and accruer, was intended, as it seems to me, at all events to be confined to the portions of such younger children as should be living at the death of the parents, minors, and being girls, unmarried. This would not be an absurd provision; for although it might still increase the portion of a child living to the specified period by the addition of the portions of children who might not live to want them, yet the number of children would be an ascertained one at the death of the surviving parent; it would, probably, not be a large one, and it could not be increased. This construction would make the settlement not an unreasonable one, viz., it would provide portions for all the younger children who during the lives of the parents should require them, and the parents could distribute the 10,000*l.* amongst them as they thought fit, and it would provide as many 1,000*l.* as there were younger children living at the death of the parents, minors, and being girls, unmarried.

The Vice Chancellor weakened the force of his decree by appearing to doubt whether the second clause gave over the portion of a child dying after the death of the parents in minority, without having been married. 2dly. Do the words authorize this construction, and will it satisfy them? The first trust was to raise a portion for every younger child, to be paid to sons at 21, to daughters at 21 or marriage, "if such respective ages shall be attained or marriages had after the decease of the survivor of the parents, and not sooner." These words do not appear to me to have been sufficiently observed upon. According to even a limited construction, they have reference only to those younger children who were under age, and (being daughters) unmarried at the death of the parents. Those who had attained 21, or married in the lifetime of the parents, may be considered to take their portions under the clause (although, as I have observed, even that point is not free from difficulty); those who had died in their parents' lifetime, under age and unmarried, took nothing, and those who survived in minority and unmarried, were the objects pointed at by the words above quoted. Now, it is to this class that I would confine the second, the clause of survivorship and accruer, which, I may observe, treats the portions becoming vested or becoming payable as synonymous terms. The third clause, it is submitted, bears out that construction, for although, as the Lord Chancellor observed, the second clause was complete without an expression that it should operate on children's portions dying in the parents' lifetime, which, standing alone, it clearly was, yet where the expression is general and a foundation is laid for doubting whether that is the true construction, the express mention of the very event in another clause *which would have been equally complete without it*, surely indicates an intention that the clause in which that event is not provided for was not intended to apply to it. If a child, dying before the portion was payable, left issue, the issue were to have the portion, whether the child died in the life-

time of the parents or survived them. But this could not be evidence of an intention to give over to the surviving children the portion of a child dying without issue before it wanted a portion in the parents' lifetime. The third, the maintenance clause, is not conclusive, but it seems to assume that all the younger children (or issue) then entitled, that is, at the death of the survivor of the parents, would require maintenance, and so far supports the view above submitted, and it is observable that it provides for the payment of the residue of the rents to the remaindermen, just as if no portions had been provided for children attaining their majority in the lifetime of the parents; and it assumes that the surviving children will be entitled to *original* shares only at the death of the parents. The proviso for cesser, under which it would be impossible to maintain that the portions would have been payable, notwithstanding that the very event provided for in that proviso had happened (*h*), has also a considerable bearing upon this question, for the term was to cease, and *no* portions therefore were to be raised in case there should not happen to be any younger children or the issue of any of them *living at the time of the decease of the survivor of the parents.* This shows the intention.

9. Some observations in the judgments of the Lords seem to show that some misapprehension existed as to the actual trusts. Lord Campbell observed, that looking at the two clauses in the settlement which must be read together, they must read together what had been called the creating or charging clause, and the dispositive clause (I); he did not see that they were at all justified in wresting the natural meaning of the words, which was, that if any children should die, whether in minority *or after they reached majo-*

(*h*) See Hope *v.* Lord Clifden, 6 Ves. 510. Powis *v.* Burdett, 9 Ves. 437, where the proviso did not, as in this case, speak in plain words of there being no children living at the death of the parents. See Howgrave *v.* Cartier, 3 Ves. & Bea. 87.

(I) Why introduce these phrases into our Courts?

rity, their portion should accrue for the benefit of the surviving children. That was clearly the natural and grammatical construction of the words. Then how were they justified in interpolating any words? The words they must interpose were, "*if any of them die after reaching the age of* 21 *years.*" Now were they justified in introducing those words into the settlement? He knew this might be considered a fantastical arrangement on the part of the settlor; it might or might not be that he might so intend; there was nothing absurd in it; there was no gross injustice that could be inflicted upon the eldest son if it was the intention that he should have exactly the same portion, whether all his brothers and sisters that came into *esse* should reach 21, or whether some of them should have died before reaching 21. It was allowed that if they reached 21, however numerous the children might be, their portions would all be charged, *and would accrue to the surviving children if they died after* 21. Then if that was so, how could he say that he was justified in interpolating the words, which they must necessarily interpolate, namely, "if they should happen to die in the lifetime of the parents." The Vice Chancellor seemed to have considered it as rather doubtful whether the portions of those children *that reached* 21 and died in the lifetime of the parents *could accrue*; but the case of Emperor *v.* Rolfe, and that class of cases, appeared entirely to dispose of that argument, and to show quite clearly that the portions of the children *who reached* 21 and died in the lifetime of the parents (I) must be considered as charged on the estate, and *must be raised for the benefit of the surviving children.* If that were so, how was he to draw a distinction between the children that died in the lifetime of the parents, having reached 21, and those who died in the lifetime of the parents, not having reached 21. In this case he did not at all know that the settlor

(I) No child attained 21 and died in the lifetime of the parents.

did not mean *what he had said, namely, that with regard to all children that came into esse and* died in minority, or whether they *died after reaching majority, either in the lifetime of their parents or after their parents died* (I), *their portions should accrue to the benefit of the surviving children.* It seemed to him that the decree ought to be reversed. Throughout these observations it seems to be assumed that the settlement directed the shares of adult children to go to the surviving children whether the former survived their parents or not: this indeed would have been an extraordinary provision, but there does not appear to be any such in this settlement. Under the first clause the portions would vest in adult children, although they did not survive their parents; under the second clause the portions to go over were only those of children who should die minors and (being girls) unmarried—it could not be carried further; and even the third clause, which substituted the issue for the child, was only in case the child should die before the portions should become due and payable, but this clause did not give any right to the surviving children. The statement that the words to be interpolated were, "if any of them should die after reaching the age of 21 years," I cannot explain.

10. We may now consider shortly the rule of construction applicable to this case, in order to ascertain whether we are at liberty to adopt that which has been suggested. It has long been settled that portions, as in this case, payable out of real estate to children at a specified age, are not raisable if the children die before the time arrive (*i*); but if the payment is postponed with reference, for example, to the circumstances of the estate, the child if he live to the specified age will be entitled although he die before the other event happen, as in this case, where the portions were not payable until after the deaths of the parents, who were tenants for

(*i*) Paulett *v.* Paulett, 1 Vern. 321.

(I) That would be whenever they died. There is probably some error in this passage.

life (I). Now the first part of this rule is a very powerful one, applicable only to this line of cases, and was introduced in favour of the heir taking the estate subject to the portions: on the other hand, where the intention is apparent the Courts will struggle with words, and even change them in order to provide children with portions who live to require them, although they die in their parents' lifetime. Of this, Powis *v.* Burdett is a powerful example (*k*). As between the children themselves, where the portions are clearly raisable, the Courts have struggled effectually to provide for a child attaining his majority, but dying in his parents' lifetime. This was first settled by Emperor *v.* Rolfe (*l*), where portions were provided by a settlement and secured by a term after the mother's death, to be due and payable at 21 or marriage, and if any of them should die before their portions *became due and payable*, it should go to the surviving daughters, with directions to the trustees for maintenance till the sum grew due and payable. There were two daughters, both attained 21 and married, but one died in her mother's lifetime, and Lord Hardwicke held that the deceased daughter did not lose her portion, and that due and payable meant the times before fixed, 21 or marriage, though it could not be raised till after the term came into possession; and this principle has been acted upon in many later cases. These authorities prove that in favour of the intention—whether to ease the estate or to provide for the children contrary to the literal meaning of the words—the Courts are authorized to struggle

(*k*) 9 Ves. 428. (*l*) 1 Ves. 208.

(I) The Lord Chancellor, in stating this rule, p. 57, is made to say that in such a case the portion will be raisable after the death of the tenant for life, *although the term out of which it was to be raised had not arisen in consequence of the party benefited not having been in esse at the time of the death of the tenant for life*, as in Emperor *v.* Rolfe, and many other cases. There seems to be some inaccuracy in this passage. In the cases referred to, the term took effect at the time appointed, although it had not taken effect when the child died, because the tenant for life on whose death it was to commence was still living.

with the words of the settlement. These cases were accordingly relied upon by the respondent in the House of Lords. Lord Brougham said he thought that Emperor *v.* Rolfe was a considerably stronger case than this; because there the term was only to be created after the mother's death. That was therefore, properly speaking, not a term created; and Lord Hardwicke, though he appeared to have felt that there was some difficulty at first, said it would be a very harsh construction, and he gave the decision which was afterwards followed in the case of Hope *v.* Lord Clifden.—The authorities, therefore, so far from not bearing out this view, or so far from supporting the decision of the Court below in this case, or from not bearing out the reversal of it, appeared to him to bear fully as strong, and even stronger, on this case than on the case of Emperor *v.* Rolfe (I). We may observe that in this case, as well as in Emperor *v.* Rolfe, the term was only created after the parents' death, (in this case after the death of both, in the other after the death of the mother,) so that there was no distinction in that respect. The point was upon the application of the case of Emperor *v.* Rolfe to this case, that is, of course, the principle of it. Lord Eldon (*m*), referring to the authorities, has said that the courts had thought themselves at liberty to manage the construction of the words, as they would not in the case of a stranger, or upon a matter of contract, without any mixture of parental feeling. In the case under consideration, Lord Campbell, as we have seen, observed that the learned Judge (the Vice-Chancellor) seemed to have considered it rather doubtful whether the portions of those children that reached 21 and died in the lifetime of their parents could accrue; but the case of Emperor *v.* Rolfe, and that class of cases, appeared entirely to dispose of that argument, and to show quite clearly

(*m*) 6 Ves. 507; and see p. 509.

(I) There seems to be some mistake, probably of the reporters, in this passage.

that the portions of the children who reached 21 and died in the lifetime must be considered as charged upon the estate, and must be raised for the benefit of the surviving children. But the Vice Chancellor, we may observe, does not appear to have supposed it possible that the portions of children who attained 21 and died in the lifetime of the parents could accrue, but his doubt was whether any child would take a portion who, at whatever age and whether married or unmarried, should die in the lifetime of the parents without issue, and this was upon the general construction of the instrument. The case of Emperor *v.* Rolfe, and that class of cases, do not show that the portions of the children who reached 21 and died in the lifetime of the parents must be raised for the benefit of the surviving children, but, on the contrary, that they would vest in the children attaining 21, although they died in their parents' lifetime, and would not survive to the other children. The principle upon which that was decided is that upon which the case of Evans *v.* Scott depended. The examination of this case has run into great length, but it is a very important case, and it is of the highest moment that the rules of construction in these cases should be adhered to, and that portions out of land should only be raised for the children for whom they were intended.

11. Where a trust in a Scotch settlement, to take effect on the settlor's death, provided 5,000 *l.* for a son, from which provision should be deducted any sum the settlor had already advanced or might still advance for the son, to enable him to carry on his business, it was held that a payment by the settlor of 2,000 *l.*, under a guarantee, at the request of the son, in favour of the partnership in which he was embarked, was money of the father lost in the business of the son, and was, therefore, an advancement within the settlement (*n*).

(*n*) Berry *v.* Morse, 1 H. of L. Cas. 71.

V. *Of voluntary settlements.*

1. A tenant in tail of estates in Ireland, under his father's will, with successive remainders to his two brothers in tail, by articles before marriage, agreed to settle the estate to uses in strict settlement, making the sons of the marriage tenants in tail male. By a settlement after marriage, and by a recovery, he settled the estate according to the articles, and added remainders to his two brothers successively for life, with remainders in like succession to their sons in tail male, remainder as he should appoint. He afterwards mortgaged the estate in fee, and died without issue, and it was held by Lord Manners, C., following the opinion of the Court of Common Pleas in Ireland, and the decision was affirmed in the House of Lords, that the mortgagee, as a purchaser *pro tanto*, was entitled to prevail over the brothers and their issue. It was insisted that this was the case of a contract, but of course that could not be maintained. It was not argued that the marriage consideration extended to the remainders to the collaterals, and of course it was not denied that the remainders in tail of the brothers were barred by the recovery; but it was insisted that the settlor being only tenant in tail, and in effect restoring the estates of the brothers in remainder, their new remainders were a substitution for the old ones, and could not be deemed voluntary within the Statute. Lord Eldon, C., oberved that it was a question of English law, and he of course held that the brothers, who were tenants in tail in remainder under the will, by the effect of the new settlement and recovery became purchasers of a quite new and different estate, and instead of tenants in tail in remainder became tenants for life, with remainder to their first and other sons in tail male, the life estate being the gift of the settlor, and also the estates of the sons, who had no estate before, and took originally [under the new settlement]. He could not find from the authorities that

those who took these new estates could be held to be purchasers for consideration, or could be regarded in any other light than as volunteers. And he held that in the creation of these estates there was no substantial distinction in this respect between tenant in tail and tenant in fee (*o*).

2. A prior voluntary conveyance will not be defeated by a subsequent settlement for value, except to the extent required to give effect to the limitations created for value in the later settlement. This, which is clear as a general rule, was applied to a case of some difficulty. I allude to the case of Croker *v.* Martin (*p*), where a father made a voluntary assignment in 1731 of the lands of Bridgetown, Grange, Clonmore, and other leasehold estates, to trustees. As to Bridgetown and Clonmore, for himself for life, and after his decease, upon trust for his eldest son, his executors, administrators, and assigns; and by that deed the father assigned other lands to trustees for himself for life, and then to his second son, and made provision for his two other sons. He reserved power to charge 2,000 *l.* on Bridgetown and Clonmore for his daughters, and to charge Clonmore, Grange, and certain other lands with 800 *l.*, as he should appoint, and the father also had a power to lease at two-thirds of the improved rent. The son being about to marry under 21, the father by a settlement, to which his son and the lady and her mother were parties, in consideration of the lady's portion paid to him, and of the marriage, assigned to trustees certain parts of the lands of Bridgetown, which by the voluntary settlement were settled on the eldest son (I), (subject to the whole of the yearly rent payable to the lessor, and the father was to hold the rest of the lands in the lease not thereby granted discharged from the payment of the rent), but

(*o*) Cormick *v.* Trapaud, 6 Dow, 60.

(*p*) 1 Bligh, N. S. 573; 1 Dow, N. S. 15.

(I) In Dow it is said the settlement was of the same lands; but see Bligh, 575, which is correct.

without referring to that deed, and the trusts were to secure annuities to the son and his wife during the father's life-time, and to raise by a day named 1,200 *l.* for the father, and ultimately in trust for the son for life, then to the sons of the intended marriage, and in default of sons to raise portions for the daughters of the marriage, and in trust as to the estate for the sons of any future marriage of the son, and in default of such sons in trust to raise portions for the daughters of any such future marriage, and upon further trust, that after the said portions should be raised, or if there should happen to be no such daughter by any after-taken wife, then *the said lands should for the remainder of the term revert to the father, his executors, administrators, and assigns.* The father also conveyed half of a fee-simple estate for the benefit of the son, and to secure the jointure, and for his issue. The father covenanted to maintain the son and his wife for a certain period, and to pay to the son 300 *l.*, and to deliver to him certain cattle on the day he was to become entitled to the life interest. The son accordingly in due time entered into possession of the lands, and received the 300 *l.* and stock when due, and signed a receipt for them, endorsed on the marriage settlement. The son died and had only one child, a daughter, and subject to her portion, the trusts created by the marriage settlement in favour of the son's issue failed. The ultimate reversion in the lease-holds comprised in the marriage settlement was claimed by the personal representatives of the father, as having vested in him under the marriage settlement, and they filed a bill to enforce their claim against the persons claiming under the son, who insisted upon his title to the reversion under the voluntary settlement. Lord Manners, C., dismissed the bill, and his decree was affirmed by the House of Lords upon the advice of Lord Lyndhurst, C., with 100 *l.* costs. The Lord Chancellor said that the marriage settlement would not prevail over the voluntary settlement further than to the extent of the limitations under the former in favour of

the son and the issue of the marriage, and, therefore, when it was provided by an express stipulation in the marriage settlement, that after all the interests that had been created by the purchase were satisfied, the estate should revert to the father, that estate would be held by the father, subject to the trusts of the voluntary settlement, which though not binding against a purchaser, was binding against him.

3. Lord Lyndhurst relied upon the acts of the father to show that he never meant that the voluntary settlement should be rescinded or altered, except to the extent of the provisions in the marriage settlement with reference to the son and the issue of the marriage, because, after the marriage settlement, the father, over and over again, recognised the existence of the voluntary settlement, and acted according to its provisions. There appears to be a misapprehension on this head, for in the particular instance which the Lord Chancellor proceeded to quote, and in the instances of the other acts proved, the father, although he no doubt granted interests under the voluntary settlement, yet did those acts in relation to the estates *not* comprised in the marriage settlement, and those acts afforded no evidence that the father considered the voluntary settlement as having any operation over the estate in the marriage settlement, indeed so much the reverse, that in making provisions for his daughters out of the estates in the voluntary settlement, he expressly confined the disposition to the estates not comprised in the marriage settlement; and one of the deeds, which created a charge in favour of a daughter, the very deed relied upon by the Lord Chancellor, recited the deed of 1731 and the marriage settlement, and that the lands charged were excepted by the father out of the settlement in order to make a provision thereout for his daughters. If the *reversion* of the lands comprised in the settlement had been considered still subject to that settlement, no doubt *that* would have been made liable to the charge and provision for the daughters executed by the father subsequently to the

marriage settlement, for the whole of the estate was originally made subject to the power to charge for the daughters, and although the power could not have been exercised so as to affect the persons within the marriage consideration, yet the reversion, according to the decision, was still within the power. In the result the *other estates* were disposed of exclusively for the daughters, and the son's representatives took the estate in dispute *under the voluntary settlement* wholly free from the 2,000*l.* to which by that settlement it was originally made liable equally with the other estates. The Lord Chancellor relied also upon the general terms of gift in the father's will.

4. But the point upon which the respondents were most pressed was, that the son, taking under both settlements, ought, after he attained 21, to have made his election to take under one deed or the other; and that, in fact, by his acts, he had elected to take under the marriage settlement. Upon this point the Lord Chancellor observed that it was impossible that the son could make his election; he was not the only party to the marriage settlement; there were other parties to that deed; he was not, therefore, in a condition to get rid of the obligation, and renounce the provisions of the marriage settlement altogether, and take under the voluntary settlement; because the parties to the marriage settlement were interested in the preservation of that settlement, and therefore it was impossible he could make such election. But it was said that he recognized, over and over again, by his own acts, the marriage settlement, long after he came of age. It was true he did recognize, by his acts, the provisions of that deed, because they were all binding and operative provisions; they were provisions made for a valuable consideration, under his marriage settlement; he could not get rid of those provisions, they existed in conjunction with the voluntary settlement qualifying that deed, but not extinguishing and annihilating that deed.

The arguments failed altogether to show that the judgment was incorrect.

5. Of course, the son could not by his election, affect the trusts created for his intended wife, and the issue of the marriage; for they were purchasers, and took paramount the very estate under the voluntary settlement which the son must have claimed as against the marriage settlement, but the reversion was not, by that settlement, settled on the wife or children, and it was in respect of that reversion he was bound, if at all, to elect. The question was, whether he could take his father's life estate, and other benefits, without giving effect to so much of the settlement as enured to his father's benefit. The father intended the marriage settlement, so far, as a substitution for the voluntary settlement: Under the latter he was tenant for life only, but he assumed, by the marriage settlement, a dominion over the whole term, and assigned it to new trustees. He then took upon himself to dispose of his son's interest expectant upon his own life estate. Did he intend any portion of that interest still to remain in the son under the voluntary settlement? The trusts of the marriage settlement, which exhausted the whole interest, afford an answer to that question. But the son taking by the operation of law, the remaining interest under the voluntary settlement, although by the marriage settlement it was declared to be a trust for the father, was bound to give that up to the father if he took the father's life interest and other benefits under that settlement. The father, in truth, was a purchaser of the wife's portion, and of the reversionary interest, in consideration of the settlement of his own interests in favour of his son. The son did many acts in affirmance of his marriage settlement, which, perhaps, ought to have made that settlement as binding upon him as if, being of age, he had actually concurred in it, and joined with his father in assigning the estate to the trustees.

6. We have already seen that the marriage consideration does not extend to collaterals; but upon a marriage a settlor may contract for interests in favour of collaterals to the marriage, or even of strangers, so as to make them purchasers, although not within the marriage consideration. This question arose in the case of Sutton *v.* Lord Chetwynd. When this case came before Sir W. Grant, Master of the Rolls, it was treated, as the report shows (*q*), as a naked case of a covenant in marriage articles to settle an estate with the ultimate remainder to a stranger, and the learned Judge held that the marriage consideration did not extend to this remainder, and that the Court would not carry into execution a covenant in favour of a stranger, merely because it was found in a marriage settlement. From this decree there was an appeal to the House of Lords, and there the real facts of the case appeared (*r*). Under the will of Frances, the wife of Sir W. Pulteney, a portion of the Pulteney estate stood limited (after failure of estates in tail male to her own sons) to the use of her daughter, Lady Bath, for life, with remainder to Lord Bath's sons in tail male, with remainder to the use of the heirs of the body of the testatrix, remainder to the use of Sir W. Pulteney for life, remainder to the use of his sons by any after-taken wife in tail male, with remainder to the use of his daughters by any after-taken wife (subject to his appointment) as tenants in common in tail, remainder to the use of Sir Richard Sutton, his heirs and assigns for ever. Lady Bath was the testatrix's only child. Lady Bath became seised of a copyhold estate in fee, upon which the contest arose. By articles executed previous to the marriage between Lady Bath and Sir James Murray, in which Sir W. Pulteney joined, it was recited that Lady Bath had, with the consent of her father, power to appoint a certain estate,

(*q*) 3 Mer. 249; the facts upon which the real point depended are not stated in the report.

(*r*) Printed Cases, D. P. 1825. See Alen *v.* Maguire, *et contrà*, Printed Cases, D. P. 1822.

and that she was under the will of Frances Pulteney entitled to an estate for life, with remainder to her first and other sons in tail male, *with divers remainders over* in the estate therein mentioned, and that she was absolutely entitled to (amongst other estates) the copyhold estate; and that Sir W. Pulteney had agreed in a certain event to relinquish his life estate in certain leasehold estates, and after Lady Bath's death to pay to Sir James Murray so much as the rents of the leaseholds should fall short of 2,000 *l.* a year; and that Sir James Murray had consented to enter into an agreement that all Lady Bath's real and personal estates (with a certain exception) should previously to the marriage be conveyed to trustees upon the trusts after mentioned. And that Sir W. Pulteney had also agreed to join with Lady Bath in conveying and settling the estates in the manner therein mentioned; and that such further and other agreements were thereupon made and entered into between the parties as were thereinafter mentioned and expressed. Then Lady Bath, with the consent of Sir James Murray and Sir W. Pulteney, covenanted to convey all her said estates, including the copyhold, so as that the same might as to part thereof after the decease of Sir W. Pulteney, and as to the remainder thereof after her own decease, be made an accumulating fund for the benefit of the younger children of the marriage, and subject thereto as Lady Bath should appoint; and in default of such appointment, upon trust for Lady Bath's separate use during the coverture; and in case at her decease all or any part thereof should remain unappointed, as to certain parts (including the copyhold estate) *in trust for such person or persons, and for such estate and estates, and with such remainders over, and for such intents and purposes as by the will of Frances Pulteney was expressed concerning the real estate of Sir W. Pulteney then deceased, thereby devised, or as near thereto as the deaths of parties and other contingencies would then admit.* And Sir W. Pulteney covenanted that he would at

the request of Lady Bath concur in all acts necessary for settling the leasehold estates, discharged from all powers, incumbrances, or charges on his part, and also for transferring other property upon the trusts before mentioned; and that he would release the estates from a yearly rent-charge of 100 *l.*, to which he was entitled, and would make up the 2,000 *l.* a year according to his agreement, and also, in certain events, other deficiencies in rentals. Sir W. Pulteney died, leaving Lady Bath his only child. She afterwards died without issue. She made her will, whereby, after reciting the marriage articles, she exercised her power over part of the personal property comprised in the articles, but made no appointment of the copyhold estate. No settlement was ever made in pursuance of the articles, and the contest arose between Lady Bath's heirs, who obtained admission to the copyhold estate, and Sir Richard Sutton, who claimed under his grandfather, Sir Richard, the remainder-man.

7. The reasons for the appellant signed by Mr. Bell, Mr. Sugden and Mr. John Stuart, were, because Sir W. Pulteney and his daughter, Lady Bath, had each of them an interest in the estates comprised in the articles of settlement, and he relinquished his interest in consideration of the settlement agreed to be made by her, and his relinquishment was a consideration sufficient to support all the limitations in the articles. This was evidently the intention of Sir W. Pulteney, in order that the copyhold estate should be settled so as to go according to the limitations in the will of Frances Pulteney, under which the principal part of the estate comprised in the articles had come to himself and his daughter: And because this was a case of articles made in consideration of marriage, where no creditor or purchaser for a valuable consideration is concerned in resisting the performance. Lady Bath did by her will recite the articles and (though no settlement pursuant to them was ever made) appointed her personal estate, in execution of the power covenanted to be

reserved to her, to persons who were mere volunteers; and the Court of Chancery, on a bill filed by one of those volunteers against Sir James Murray, who survived his wife, decreed that these volunteers were entitled. It would be difficult to distinguish the cases: And because if the articles had been performed by equity in the lifetime of Lady Bath and her husband, they must have been executed *in toto:* And because the appellant had a right to bring an action for breach of contract in the names of the trustees of the articles, and equity, to prevent circuity of action, would perform the articles in specie. The reason for the respondents, signed by Mr. Horne, Mr. Shadwell, and Mr. Pemberton, was, that the appellant not being within the consideration of the articles, had no right to call upon a court of equity for a specific performance of the articles against the heirs of Lady Bath. For the appellant it was argued that the case below was decided upon want of consideration, but the ground now relied upon, of Sir Wm. Pulteney's concurrence, was not raised. Were not he and his sons entitled to a specific performance? The foundation was contract; but did he not contract for all the limitations in Frances Pulteney's will; did he not pay a large price? How could it be shown that this consideration was only paid for the limitations within the marriage consideration? Could not the heirs of Lady Bath have claimed the benefit of the agreement? Then how could they refuse to execute it? The agreement was binding on the heirs, Rippon *v.* Dawding, Ambl. 565. Sir W. Pulteney's concurrence, and the consideration moving from him, supported all the limitations not within the marriage consideration. Osgood *v.* Strode, 2 P. Wms. 245; Roe *v.* Mitton, 2 Wils. 356; Stephens *v.* Truman, 1 Ves. 73; Pulvertoft *v.* Pulvertoft, 18 Ves. 92. And the articles should be executed in all their parts. Vernon *v.* Vernon, 2 P. Wms. 504; Goring *v.* Nash, 3 Atk. 186; Hall *v.* Lamb, 2 Eden, 292. For the respondents it was argued that no contract was made with Sir

Richard Sutton, and that no step was taken to carry the articles into execution [there was a decree for Lady Bath's appointees]; that the real object of the settlement was to withdraw Lady Bath's property from her husband; the only intention was to make her a *feme sole*. Sir Richard Sutton was not named in the articles, and the recital of Frances Pulteney's will stopped short at the limitations to Lady Bath for life with remainder to her sons. [But the recital referred to the remainders over, which included a limitation to Lady Bath herself in tail, and limitations to Sir W. Pulteney and his sons and daughters by any future marriage.] There was no agreement to settle the estate in question. [It was inserted by name in the proper schedule.] Sir Richard Sutton was a mere volunteer, and no person within the marriage consideration was alive when the bill was filed. If even a settlement had been made, a sale would have defeated it. Copyholds were not liable to debts at law, and therefore the remedy was against the assets. Lord Eldon, C., said that by the deed of 1772 the legal fee was vested in Sir Richard Sutton for Lady Bath's appointment (I), and the copyholds were to go to the same uses (II); the question, therefore, was whether the parties could take the legal estate of the freeholds out of Sir Richard (III) without placing the copyholds in the same situation with the freeholds; the next question was, whether Sir W. Pulteney purchased for Sir Richard, and thereupon the House directed the case to stand over to be argued by one counsel aside in the next Session. The case was accordingly reargued with great care, and it was ordered that the appeal should be dismissed and the decree be affirmed. In a case in Ireland in 1835, the Chancellor of Ireland observed (*s*) that the case of Sutton *v.* Chet-

(*s*) Llo. & Goo. t. Sugd. 343. In the second line from the top, for merely read namely.

(I) This was a deed shortly stated prior to the will of Frances Pulteney, which will created the power in Lady Bath.

(II) By Lady Bath's marriage articles.

(III) No bill had been filed for that purpose.

wynd was twice argued; he never could divest his mind of a doubt that that case was not properly decided in the House of Lords. Whilst arguing the general question before Lord Eldon, subsequently to the decision in the Lords, he stated to him (Lord Eldon) his doubt, but added truly, that his mind so naturally bent to his (Lord Eldon's) opinion that he had no difficulty in believing he was wrong. Lord Eldon said he would not advise him to be too sure that he was wrong, but they decided the case as well as they could, from which he rather collected that Lord Eldon himself entertained a doubt upon the point. Twenty-two years have elapsed since the judgment was delivered. I have always thought the decision wrong, and now, after a deliberate review of the case, I continue to think that Sir W. Pulteney ought to have been considered as a purchaser of *all* the limitations in the will of Frances Pulteney which were not within the marriage consideration.

VI. *Of other rights and liabilities.*

1. Lord Redesdale laid it down in the House, that a tenant in tail who is an adult, being capable of barring the entail, is not bound to keep down the interest of a mortgage affecting the estate out of the rents of the estate; but with respect to an infant tenant in tail the rule is otherwise for an obvious reason, that in consequence of his infancy he is not capable of making an absolute disposition of the estate, and therefore it is considered that those who receive the rents for him are bound to keep down the interest during his infancy. A tenant in tail grants a lease, and does not bar the entail; the lease is not void, but it is voidable. If he grants a lease with warranty, and there are assets descending to the heir of entail, the lease is good, because the warranty will bind the heir of entail if there are assets to answer that warranty; if he grants a lease with a covenant binding the heir of entail, and there are assets descending to the heir to answer that covenant, the heir of entail is so

far bound as to be compelled to make recompense for the breach of covenant out of those assets. Therefore it was that a lease by tenant in tail was not absolutely void, but voidable at the election of the heir (*t*).

2. As between an heir and executor, although the ancestor himself purchased the land, and was an extensive owner of coal and iron mine works, yet machinery fixed to the soil, and which could not be used without being so fixed, and which was necessarily so fixed for the purpose of the profitable use of the land, will belong to the heir, but tools employed in the machinery, but not necessarily affixed thereto, and capable of being employed elsewhere in the same manner, and parts of machinery prepared for fixing, but not actually fixed, will belong to the executor (*u*). But where the corpus of the machinery is held to belong to the heir, all that belongs to that machinery, although more or less capable of being used in a detached state from it, still if it belongs to the machinery, and belongs to the corpus, the article, whatever it may be, must necessarily follow the same principle, and remain attached to the freehold (*x*).

3. Where trust money under a marriage settlement, which ought to have been laid out in the purchase of lands of inheritance to be settled to uses in that settlement, was laid out by the husband, the tenant for life, in the purchase of leaseholds, of which he took an assignment to himself, and then mortgaged them to the trustees, and he demised a portion of the leaseholds to the attorney employed in the transaction at a rent below its value, and the trustees confirmed the lease, the Court of Exchequer in Ireland being equally divided in opinion dismissed a bill filed by the son of the marriage after his father's death, to have the benefit of the purchase, which had proved a beneficial one, discharged of the lease to the attorney, but upon an appeal to the House

(*t*) Case of the Queensberry leases, 1 Bligh, 499.

(*u*) Fisher v. Dixon, 12 Cla. & Fin. 312.

(*x*) Ib. 330, per Lord Cottenham.

of Lords that decree was reversed upon the advice of Lord Redesdale and Lord Eldon, C. (*y*). They laid it down to be quite clear that if the trustees had purchased this interest or taken this lease for themselves, all the benefit would have belonged to the trust fund, for it was perfectly settled that trustees could never deal with the trust fund for their own benefit, nor could the father, who was only tenant for life, take the purchase for his own benefit solely. This was a very beneficial leasehold interest, but the benefit must belong to the trust fund. If a purchase of stock had been made in the name of the tenant for life with the trust money and the funds had risen, according to innumerable cases in Equity the profit must belong to the trust fund.

4. If the property to which an infant is entitled under settlements be obtained out of court by misrepresentation, the Court has power to order the parties to restore the funds with a view to secure the rights of the late infant, although subsequently to her majority she may have executed deeds for carrying the object of the parties into execution. Therefore where Lady Mary Bowes, who was entitled (amongst other sums) to a sum of 4,000*l.*, payable on her father's death, and her father and others presented a petition in her name (whilst she was under age) founded upon a deed by which her father and brother had assigned to an attorney as a trustee for her as a present provision, the property upon which the 4,000*l.* was charged in lieu of the 4,000*l.*, and praying that the stock, which was in effect assigned by the deed, might be transferred to the attorney for the immediate use of Lady Mary;—the order was made at the Rolls, and the stock was transferred to the attorney a few days after Lady Mary attained 21. No money was paid to her, but a mortgage was executed to her a few days after she attained 21, (without noticing the order and payment of the fund), for 4,000*l.* by her father and brother, just as if she had advanced them the money, and she wrote a letter to her father from

(*y*) Phayre *v.* Perce, 3 Dow, 116.

a copy furnished to her, declaring that she would not claim the interest during his life. There was another transaction of the like nature. Lady Mary's funds were settled on her marriage, but with a power to dispute the securities. A petition was presented for the re-transfer of the funds obtained out of court, which the Master of the Rolls dismissed, but upon an appeal, Lord Eldon, C. granted the relief. The order premised that, although it might not be competent upon that petition of appeal to make any order determining the right to the stock or to relief against the acts complained of, nevertheless he declared that, having regard to the nature of the information given to the late Master of the Rolls when he made the order, and to several of the matters in the affidavits, &c., from which it appeared that important information was withheld from the Court which ought to have been communicated to it, and having regard to the duties of parties applying to the Court on behalf of infants, or upon behalf of persons instantly upon their ceasing to be infants, and not fully informed of their rights or of the nature and purpose of the applications made upon their behalf, correctly to represent to the Court all that it concerned the interest of those on whose behalf application was made that the Court should be informed of, and having regard to the necessity of the Court's enforcing the discharge of this duty, and having regard to the fact that the late Master of the Rolls appeared to have been induced to make the order as one intended to operate for the sole and immediate use of Lady Mary, although it appeared to his Lordship that it was not intended, and that it was known by the parties complained of as concurring in the order complained of or taking benefit under it, that it was not intended so to operate, but for the immediate use and benefit of others, and that therefore the late Master of the Rolls was misled and deceived when he made the order: it was competent for the Court upon the original petition, being satisfied

that the order had been obtained by undue means, to order the re-transfer to the Accountant-general of the stock so unduly obtained out of Court, there to remain till further order for the benefit of such party or parties as should appear to the Court entitled thereto, and without prejudice to the legal or equitable effects of any act done, assented to, or sanctioned by the respondents or any of them. With this preface a special order was accordingly made, which included the attorney and another person who had acted as agent in the transaction and had advanced money. The order, which is quoted for the purpose of preserving Lord Eldon's declarations, was affirmed upon appeal to the House of Lords, with 50*l.* costs (*z*).

VII. *Of the rights of husband and wife.*

I. 1. We are now to consider the cases decided between husband and wife, mostly springing out of settlements, and relating to dealings with her interests.

2. In Howard *v.* Lord Digby (*a*), where under the marriage settlement of the Duke and Duchess of Norfolk, made before he succeeded to the title, the Duchess, in the events which happened, became entitled to two annual sums, in the nature of pin-money, payable partly out of her own estates, and partly out of the Duke's. The Duchess survived the Duke; and upon a commission issued in 1816, after his death, she was found to have been a lunatic, without lucid intervals, from December 1782; but the Duke had maintained her according to her station, and paid all her bills during that time. After proceedings by the committees, which determined by the Duchess's death, her personal representative, upon a bill filed, obtained from Sir L. Shadwell, V. C., a decree for payment of all the arrears of the pin-money, being 1,000*l.* a year, for 33 years.

(*z*) Printed Cases, D. P. 1826.

(*a*) 2 Cla. & Fin. 634; 8 Bligh, N. S. 224; 4 Sim. 588.

From this decree there was an appeal to the House of Lords (I), and upon the advice of Lord Brougham, C., the decree was, on the 11th July 1834, reversed, and the bill of the respondent was dismissed, but without costs; his opinion being that, upon principle, the wife's *representatives* could not recover *any* arrears of the pin-money; the lunacy he disregarded, as the Duchess's bills were paid by the Duke, although, in the course of the case, he seemed inclined to direct an account of the arrears, with an allowance to the Duke's representatives, of the money actually expended on the articles to which pin-money is usually applicable. It was not, of course, denied that the wife might recover an arrear of her pin-money; and it can rarely occur that any question can arise between *her* personal representative and her husband, because he surviving would, in general, himself be her personal representative. The Lord Chancellor said that he had held communication with a number of those noble persons whose opinions were entitled to great weight, and he found that his impression respecting the nature of pin-money was by no means confined to himself; that the view he had formed of it was the universally prevalent view among all who had considered the matter.

3. In this case some new doctrines were laid down by the Lord Chancellor (*b*). "Shall it," he asked, "be said, that her Grace of Norfolk, the first lady in England, after the blood Royal, who takes precedence of all the King's subjects, while her husband is preceded by several, from official rank—shall it be said that this lady may dress herself like a peasant's wife, may lay out 10*l.* by the year upon her own personal expenses; may give no monies, either in charities to the poor, or in largesse to her servants, her attendants, or her maidens? In former times, when pin-

(*b*) See 2 Cla. & Fin. 675, 676, 677, and p. 656 and 657.

(I) The respondents rejected the offer of a large sum by the appellant by way of compromise.

money was first introduced, the Duchess of Norfolk had ladies in waiting, esquires' wives and barons' daughters, just as the Queen of England has at this day. The less aristocratic habits of modern times have altered that, but pin-money was invented in the days when the Duchess of Norfolk was more like a princess than a subject: shall it be said, then, that this distinguished lady is to give no largesse to any of her attendants or servants, that she may dress herself either, so that she shall not be admitted at Court, or so that she shall never appear at a county meeting or assize ball, or upon any of those occasions when the nobility of the country show themselves among their fellow subjects, that she may dress herself in such a manner that she shall not be able to show her face at those places of resort, or so that if she appears her noble consort shall be ashamed of seeing her there and of owning his connexion with her, that she may in every respect spare every expense upon her person and hoard her pin-money, that she has a right to do so in neglect of the rank and in spite of the authority of her husband, and when her husband dies that she may claim, or when she dies that her representatives may claim, the whole arrears of pin-money, as if it had been set apart as an annuity of which she had a right to the separate use, and to the arrears of which she had just as good a right as her husband had to the residue of the estate upon which that annuity stands charged? Is that a tenable proposition? The principle of this decree cannot stop short of that proposition. I deny," the Noble Lord said, "that such is the nature of this provison; it is meant for the wife's expenditure upon her person; it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. *It is a fund which she may be made to spend during the coverture by the intercession and advice, and at the instance of her husband.* I will not," he added, "go so far as to say, because it is not necessary for the purposes of this argu-

ment, that he might hold back her pin-money if she did not attire herself in a becoming way. *I should not be afraid, however, of stretching the proposition to that extent*, but I am not bound here to do so, because if during the coverture a claim was made by her (and this is one distinction between the claim of the wife and the claim of her personal representatives after her death), the absurd and incredible state of things that I have put as the consequence, the case of her attiring herself in an unbecoming manner, never could happen if the pin-money is only to be claimed by herself, for in that case the Duke would of course say, 'If you do not dress as you ought to do, what occasion have you for pin-money?' He need not refuse, but he remonstrates; he uses that influence which the law supposes him legitimately to have over his wife, and sees that the fund is duly expended for its proper purposes. The purpose is not the purpose of the wife alone; it is for the establishment, it is for the joint concern; it is for the support of that family whose brightest ornament very probably is the wife; whose support and strength is the husband, but whose ornament is the wife. It is to support the dignity and splendour of the joint establishment, consisting of husband and wife, that part of the whole expenditure is for the support of the wife herself. Then does it not follow from thence that the husband has a direct interest in the expenditure of the pin-money? He has a right to have the pleasure of it, to have the credit of it; to be spared the eyesore of a wife appearing as misbecomes her station; that is the distinction and the object of pin-money."

4. I could not resist transferring this striking passage on pin-money to these pages. It carries back the origin of pin-money to a more remote period than the history of the law warrants (I). As far as the husband's just influence

(I) A learned and ingenious friend to whom I stated my doubt as to the remote origin assigned to pin-money, wrote to me an instructive and amusing letter on the subject to the following effect:—"'To me much pondering' on

over the wife may operate, her liability to expend her pin-money according to her station may rest upon the observations which I have quoted. But the wife's liability is one of imperfect obligation. Her pin-money is not a fund which she may be made to spend during her coverture in dress,

the judgment in Howard's Case, and your commentary on it, it is doubtful whether any one can throw much if any light on the origin and introduction of pin-money. It came to us, I take it, later than the Restoration, or probably found its way into England at that time; I believe that no mention is made of it previously; and since then little more is to be found than the casual notice of it in the comedies and light literature at and subsequent to that period. You are aware of Addison's paper, No. 295, in the Spectator, of which, as I have it now before me, I will transcribe so much as pretty well shows the uncertainty of its origin, the lateness of its introduction amongst us, and, moreover, that our amiable progenitrixes were little disposed to deal with it otherwise than as their own uncontrollable property. 'Mr. Spectator (says Josiah Fribble), about a dozen years ago 'I was married, for my sins, to a young woman of a good family, and of an 'high spirit, but could not bring her to close with me before I had entered 'into a treaty with her, longer than the Grand Alliance. Among other 'articles it was therein stipulated that she should have four hundred a year 'for pin-money, which I obliged myself to pay quarterly into the hands of 'one who acted as her plenipotentiary in that affair. The lady has had seve-'ral children since I married her; the education of these my children, who, 'contrary to my expectation, are born to me every year, straitens me so 'much, that I have begged their mother to free me from the obligation of 'the above-mentioned pin-money, that it may go towards making a provi-'sion for her family. This proposal makes her noble blood swell in her 'veins, insomuch, that finding me a little tardy in her last quarter's pay-'ment, she threatens me every day to *arrest me*, and proceeds so far as to 'tell me that if I do not do her justice, *I shall die* in a *jail*. To this she 'adds, when her passion will let her argue calmly, that she has several play 'debts on her hand, which must be discharged very suddenly, and that she 'cannot lose her money as becomes a woman of her fashion, if she makes me 'any abatement in this article. I hope, sir, you will take an occasion from 'hence to give your opinion upon a subject which you have not yet touched, 'and inform us if there are any precedents for this usage among our ancestors, 'or whether you find any mention of pin-money in Grotius, Puffendorf, or 'any other of the civilians.'

"Thus appealed to, Addison, from that acquaintance of which he boasts 'with the benchers of Lincoln's Inn,' had very ready means of answering to the full extent of the inquiry but he is unable to say more than that the doctrine of pin-money is of 'very late date, unknown to our great-grand-'mothers, and not yet received by many of our modern ladies; it is for the

ornaments, gifts, or charity. Her right to demand from her husband what her pin-money ought to supply her with is one thing, and her liability to expend it in a manner befitting her station is another. She may recover, if she pleases, her pin-money annually, or at the times fixed by

'interest of both sexes to keep it from spreading.' The whole of the paper is well worth reading.

"'Pin-money,' says Johnson, with an accuracy almost of definition within the principle of your commentary, is 'money allowed to a wife for her private 'expenses without account.' Of course, therefore, without account as her *property*. He instances but one authority, that of Addison in another paper, 'The woman must find out something else to *mortgage* when her pin-money 'is gone,'—an incident to it as to her 'property' and consequence imminently threatened in a picture, I think, by Hogarth, of 'The Ladies' Last 'Stake,' where the pin-money having been lost, and the last stake mortgaged, her equity is in the very jaws of foreclosure—'just in the jaws 'of ruin and quadrille.' Pins in the Encyclopœdia Britannica are mentioned as of late introduction, probably from France, and obviously enough described, 'chiefly used by women in fastening or adjusting their dress.' This notorious and almost peculiar use of them, by a familiar figure of speech would familiarly sanction its adoption as comprehending all her private expenses. Autolycus, in the Winter's Tale, tempts his female customers, with—

'Pins and poking-sticks (*a*) of steel,
'And what maids lack from head to heel.'

"And on Belinda's toilet—

'Here files of pins extend their shining rows,
'Puffs, powders, patches, bibles, billet-doux.'

"Pins, therefore, as an article of dress so essential, so much in use, and so from time to time calling for supply, might very appropriately be selected as a term comprehending all the mysticism of a lady's expenses. The husband might be well deemed to have too much of love of his money, and too little love of his wife, who would not take delight in seeing her 'neat as a new pin;' or who should, by stinting her private pocket, appear not to 'care a pin about her.' I will not, however, let you off without a little parade of my learning, for I have 'a head as well as a pin,' and will not lose sight of the point, viz. whence the origin and when the introduction of pin-money? With regard to the latter question, as one of fact to be left to the jury or to the Master, I find (and it is peculiarly within the province of said jury or of said Master) that it came into this country at or subsequently to the Restoration. Both the little evidence there is, and the want of antecedent evidence, coincide with that conclusion. With

(*a*) Bodkins.

the settlement for payment of it, and though she be a miser and a slattern, her husband would be without remedy. He could not defend himself against the legal remedies of the wife's trustees, nor could a court of equity refuse to interfere for the wife, or give him any relief. If such an equity were to be administered, our courts would have in every case to enter into domestic disputes in regard to the wife's disposition of her pin-money, and to examine into the articles of her dress and the ornaments of her person, into the disposition of her pocket-money, into the amount of her card-money, into the extent of her charities, into, in short, that very expenditure to answer which the pin-money was given in that form for the express purpose of excluding the inspection and control of the husband over it. Happily our domestic relations are such that it is rarely any disputes arise between husband and wife relating to pin-money, which they cannot settle between themselves; and nothing could strike more fatally at the peace of families than a doctrine which would enable the husband to coerce his wife in the expenditure of her pin-money, or enable him to call

regard to its origin, I hazard a reference to this explanation of the word:— 'Epingles, un terme de jurisprudence, que les auteurs comprennent sous le 'terme de Jocalia, ou Monilia, sont un présent de quelques bijoux, ou même 'd'une somme d'argent que l'acquéreur d'un immeuble donne quelque-'fois à la femme ou aux filles du vendeur, pour les engager a consentir à la 'vente. Les épingles sont pour les femmes ce que le pot-de-vin est pour le 'vendeur; mais elles ne sont point censées faire partie du prix, parceque 'le vendeur n'en profite pas directement; elles sont regardées commes des 'présents fait volontairement à un tiers, et indépendans des conventions, en 'sorte qu'elles n'entrent point dans la composition du prix pour la fixation 'des droits d'insinuation et centième denier, ni des droits seigneuraux, 'à moins que le présent ne fût excessif, et qu'il n'y eût une fraude évidente. 'Mais elles sont censées faire partie des loyaux coûts, pourvu qu'elles soient 'mentionnées et liquidées par le contrat, auquel cas le retrayant féodal ou 'lignager est tenu de les rendre à l'acquéreur.' Voyez Buridan sur la Coutume de Vermandois, Art. 236; et Billecoq Traité des Fiefs, p. 136, c. 444; from which learned sources of course you must give my erudition the credit of extracting it; but nevertheless, you will find it all done to your hand in the Encyclopédie ou Dictionnaire Raisonnée des Sciences, Art. Epingles," Tome 12.

her to an account for its application (*c*). Even the committee of a lunatic is allowed to save what he fairly can, and is not accountable for the surplus; but a wife's pin-money, unlike the allowance to a committee, cannot be revoked, as it depends upon contract, just as much as the husband's own right to her property settled upon him.

5. As to the merits of the decisions of the Vice Chancellor and of the House of Lords, the former could not be wholly supported, inasmuch as it gave to the Duchess's representative the whole of the pin-money for the 33 years, without any allowance to the Duke's estate for the articles furnished by him, but which would naturally have been paid for by the Duchess out of her pin-money had she been of sane mind. That certainly was not justified by the rules of equity. On the other hand, it will be found difficult to support the decision of the Lords. The Duchess survived the Duke, so that the right, whatever was the extent of it, vested in herself and not in her representatives. Of course whatever she could have recovered at the Duke's death her personal representative could recover after her death. What defence therefore was there, at all events, to the claim to a year's arrear? The 1,000 *l.* a year was by the settlement anxiously guarded against the control and liabilities of the Duke; still it was fairly deemed pin-money, and therefore if the Duke had supplied the Duchess with pocket-money, and articles of dress, and the like, and she had acquiesced, that would have been a satisfaction of all but the last year's arrear; that is, every year's expenditure would be deemed a satisfaction of that year's pin-money. But here the mind was wanting; the Duchess could not consent. What then was to be the guide? The answer is, *the provisions of the settlement and the rules of equity.* The first forbade the husband to interfere with the fund, although his wife expressly or by her acts might allow him to apply it without account. The second enabled the Court to do

(*c*) See Grosvenor *v.* Sawbridge, Privy Council, 1834.

what the wife might have done if of sane mind, and to sanction the husband if he so acted, even without the previous leave of the Court. If, therefore, he applied the pin-money in the charities which she supported before her mind gave way, and in dress becoming her station (I), to that extent he ought not to be liable to pay the pin-money over again. Beyond that he seems to have no equity. The contract is directly against him. The wife was incapable of assenting to his appropriating any part of the pin-money to his own use. If the wife, whilst sane, had received her pin-money, any savings would, notwithstanding what was said in the House of Lords on the general doctrine, clearly belong to the wife surviving. During her lunacy there was, we will suppose, a large saving. Why should she, surviving, be deprived of her right to it? Suppose her then to have recovered her mental faculties—she lived five years after her husband—why should she not have the fund belonging to herself by contract, and remaining unpaid and unapplied, to add to her enjoyments; to replace her long neglected wardrobe and the ornaments of her person, to re-establish her charities, to reward her ancient dependents? Her lunacy, no doubt, was a heavy calamity, but the husband was not to seek for compensation in appropriating, against his surviving wife, the income expressly provided for her by her marriage settlement. I have once more looked into all the authorities on this subject, but I cannot find any which would support the decision in the House of Lords; there are however several which it would seem to be difficult to reconcile with that authority (*d*).

(*d*) Lady Warwick *v.* Edwards, 1 Eq. Ca. Abr. 140; Powell *v.* Hankey, 2 P. Wms. 82; Fowler *v.* Fowler, 3 P. Wms. 353; 1 Ves. 267; 2 Ves. 7; Ridout *v.* Lewis, 1 Atk. 269; Moore *v.* Moore, 1 Atk. 272; Attorney-General *v.* Parnther, 3 Bro. C. C. 441; 4 Bro. C. C. 409; Brodie *v.* Barry, 2 Ves. & Bea. 36. See More *v.* Lord Scarborough, 2 Eq. Ca. Abr. 156, pl. 7.

(I) Pin-money is not always intended to supply dress; the amount of it, having regard to the station of the parties, will generally show what the intention was.

6. Where a settlement was made in England of the fortune of the wife, who was an infant and a ward of Court, upon herself for life, with remainder to her children, and there was a power to advance a portion in her lifetime, with her consent, it was held in the House of Lords, reversing a decision in Scotland, that the wife surviving her husband was not bound to maintain the children. This was an English settlement, and this was the law of England. In Scotland it was considered as a clear case on the Scotch *jus naturæ*; but even on that ground the decision, which was in favour of the eldest son, who had attained his majority, was reversed, as the son had a vested interest in remainder, and might dispose of it in the market (*e*).

7. In a later case in Ireland (*f*), in which the above case was not cited, a settlement had in effect been directed to be made of the wife's fortune on herself, for her separate use for life, and afterwards to her children. She had been a ward of Court, and the husband had greatly misconducted himself. There were two children of the marriage; the wife had eloped from her husband, and he alleged that he was incapable of maintaining and educating them. Sir W. Macmahon, Master of the Rolls, made a reference to the Master, with a view of allowing to the husband during his life, and afterwards to trustees during the wife's life, a portion of the dividends of the wife's portion for the maintenance of the children during their minority, and for their subsistence and advancement afterwards. Upon an appeal Sir Edward Sugden, C., reversed the order, being of opinion that the mother was not legally bound to maintain the children, but notwithstanding her misconduct was entitled to receive the whole of her income for her separate use. Upon a rehearing Lord Plunket reversed this order, but upon an appeal to the House of Lords his order was re-

(*e*) Woolley *v.* Maidment, 6 Dow, 257.

(*f*) Hodgens *v.* Hodgens, Llo. & Goo. t. Sugd. 259; Llo. & Goo. t. Plunket, 137, 148; 4 Cla. & Fin. 323; 11 Bligh, N. S. 62.

versed, and the decree of the former Chancellor established, upon the advice of Lord Cottenham, C., and with the concurrence of Lord Wynford and Lord Brougham.

8. A trust for a married woman for her separate use declared not to be assignable is valid, and consequently any assignment by her would be void (*g*).

9. Where upon a simple mortgage by the husband and wife of the wife's estate, the equity of redemption is reserved to the husband and his heirs, if there is no other evidence of the intention, or if the recital shows that the instrument is framed for other purposes, the husband is seised of the estate which he before had, viz. *jure uxoris*; and equity throws this protection round the wife, that the deed shall operate no further than its particular purpose, unless there is some recital of intention that the husband should take the benefit (*h*).

10. Therefore in Ruscombe *v.* Hare (*i*), where a man mortgaged his real estate by two mortgages to secure certain sums, and interest at 4 ½ per cent. for one sum, and 4 ¼ per cent. for the other, and then devised the estates to his wife in fee, and made her executrix and residuary legatee; the wife joined with her second husband in a mortgage and fine to the same mortgagee. The mortgage deed recited that the sums were still due, but that all interest had been paid, and for better securing the sums, with such interest as after mentioned (which was five per cent.), the husband and wife conveyed the fee to the mortgagee discharged of the former proviso for redemption, but subject to a new one, viz. that upon payment by the husband, his executors, administrators, or assigns, of the aggregate amount of the mortgage monies, and interest at five per cent., the mortgagee should reconvey to the husband, his heirs, and assigns for ever. The husband entered into a covenant that he and his wife would execute further

(*g*) Rennie *v.* Ritchie, 12 Cla. & Fin. 204.

(*h*) See 6 Dow, 17, 18.

(*i*) 6 Dow, 1; 2 Bligh, N. S. 192.

assurances, and he gave a bond for the mortgage monies and interest. The husband survived his wife, and sold part of the estate and paid off the mortgage money, and obtained a reconveyance in fee to himself of the residue of the estate which he devised; and it was held by the Court of Exchequer, and that decree was affirmed by the House of Lords upon the advice of Lord Eldon, C., and with the concurrence of Lord Redesdale, that the equity of redemption still belonged to the wife, and descended to her heir (a son by the first marriage), and did not vest in the second husband under the reservation in the last mortgage deed, and that his covenants and bond could not be deemed a purchase of the equity of redemption, and the purchaser was not deemed one without notice, inasmuch as the equity appeared on the face of the deed.

11. The decree of course was that the son might redeem. The Court of Exchequer directed no account of the interest till the death of the husband, who survived the wife five years. Lord Eldon, C., after observing that the husband and wife, whilst they both lived, were not bound to keep down the interest, but that when the wife died the husband became tenant for life by the curtesy, and as tenant for life was bound to keep down the interest from that time—held, that the arrear of interest at the death of the wife must be converted into principal, and considered as a charge on the estate, and the estate must answer it, so that the arrear of interest was to be converted into principal at the death of the wife, and to be considered as a charge on the estate, and from that time the husband was bound to keep down the interest. The Order of the House was confined to the interest *due* at the death of the wife, and of course the persons claiming through the husband failed in an attempt to charge the estate with the payments made by the husband in the wife's lifetime (*k*).

12. But although a recital, by declaring the intention,

(*k*) 2 Bligh, N. S. 192.

may place beyond doubt the intention to transfer the equity of redemption to the husband, yet a recital is not essentially necessary, for the frame of the deed may so clearly show an intention to act upon the equity of redemption that Equity would be bound to give effect to it. Lord Eldon, however, was at one period of opinion, following as he considered the rule laid down by Lord Thurlow, that nothing short of a recital would enable Equity to support a new destination of the equity of redemption.

13. In Jackson *v.* Innes (*l*) the wife's estate by a marriage settlement was limited to the husband for life, then to the wife for life, remainder to all the children in strict settlement, remainder to the wife in fee, with a power of revocation and new appointment in the husband and wife. The husband and wife made a mortgage for 1,000 years, with a proviso for cesser of the term, upon payment by the husband and wife, or either of them, their, or either of their heirs, &c. Of course this was considered to operate under the power of revocation and new appointment, and not to affect the limitations in the settlement beyond the charge. Then followed the transaction upon which the question arose. The husband and wife borrowed a further sum of the mortgagee, and confirmed the term of 1,000 years discharged from the former proviso, but subject to a proviso for cesser of the term, upon payment by the husband and wife. The husband and wife covenanted to levy a fine (which was accordingly levied) to enure to the mortgagee for the term, subject to the proviso for redemption; and after the expiration or sooner determination of the term, to the use of the husband and wife, for their lives, and the life of the survivor, and after the decease of the survivor to the use of the heirs of their two bodies issuing, and for default of such issue, to the

(*l*) 1 Bligh, 104; 16 Ves. 356. Lord Kinnoul *v.* Money, 3 Swanst. 202, n.; Reeve *v.* Hicks, 2 Sim. & Stu. 403, a case of much difficulty; Ravald *v.* Russell, You. 9; Anson *v.* Lee, 4 Sim. 364; 1 Sugd. Pow. 345; Martin *v.* Mitchell, 2 Jac. & Walk. 413; 1 Sugd. Pow. 352.

use of the right heirs of the survivor of the husband and wife for ever. Lord Eldon, C., held that the equity of redemption remained in the wife, notwithstanding the declaration of the uses of the fine. But upon an appeal to the House of Lords the decision was reversed; and it was held that the deed operated not only as a further charge, but also as a new settlement of the estate, subject to the term. Lord Redesdale observed that the question did not arise upon the interpretation of the proviso for redemption, but it arose upon a distinct and subsequent clause of the deed. The term and the fee were kept distinct in the deed. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating upon the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The deed was clear and express in its declarations and provisions. Where the form of the equity of redemption had nothing to do with the limitation of the estate, where the limitation of the estate was perfectly distinct, it seemed to him the rules which had been established in the cases of resulting trust did not in any degree apply. The limitations applied to the reversion in fee, whilst the mortgage was confined to the term of 1,000 years. Lord Eldon observed that the Court below did not rightly apprehend the case as it now appeared. The judgment of the House would remove a difficulty which he knew was floating in the minds of many persons. He conceived it to have been the opinion of Lord Thurlow, that, in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be, in the recitals of the instrument, some expression that the parties meant it so; that it was not enough to collect the intention from the limitations, but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were. It did, however, occur to him, looking into the cases which had

been referred to, that such a proposition could not be supported, and therefore he was of opinion that the decree must be reversed.

14. There can be no doubt that the case was properly decided in the House of Lords, but Lord Eldon, C., did not advert to the distinction upon which Lord Redesdale moved the reversal of his decree, viz. that beyond the mortgage of the term, there was a distinct and clear settlement in a new line of the fee, and this settlement of course carried the legal fee, subject to the term. Lord Thurlow never, it is apprehended, expressed an opinion that a deed unconnected with a prior mortgage, limiting the wife's equity of redemption to other uses, would not be valid, because the deed contained no recital of the intention to make such settlement. The settlement itself, in such a case, proves the intention. Lord Thurlow's opinion depended upon a reservation of the equity of redemption in a mortgage, and so, no doubt, Lord Eldon intended to represent it. That, if correct, was no authority for the original decree, in the case before Lord Eldon. That doctrine would have been put to the test if, in the above case, the proviso for redemption of the term had been to the husband and wife, and the survivor, during their lives, and the life of the survivor, and then to the heirs of their two bodies issuing, and in default of such issue, to the right heirs of the survivor of the husband and wife for ever. It is important in practice to keep in view what really was the ground upon which the case of Jackson *v.* Innes was decided.

15. As to separation deeds. In Warrender *v.* Warrender, where the husband and wife executed a deed reciting their agreement to live separate from each other, and he provided an annual income payable to trustees for her, Lord Lyndhurst observed, upon the question of domicile which arose in that case, that the deed of separation amounted to nothing more than a mere permission to one party to live separate from the other—not a binding obliga-

tion in the eye of the law,—and there the matter rested. It conferred no release of the marriage contract on either party, and neither could thereupon presume to violate it. The strongest articles of separation might be drawn up and signed, with full acquiescence of husband and wife, yet he might sue her and she might sue him notwithstanding. It was at the most a mere temporary arrangement or permission to live elsewhere, but the legal domicile remained as it was. One might pledge himself not to claim or institute a suit for conjugal rights, but he could not be bound by any such pledge, for it was against the inherent condition of the marriage state, as well as against public policy. It was said that Lord Eldon, in the case of Torry *v.* Lindsay, in that House, threw some doubt on the principle, and seemed inclined to give effect to those deeds of separation; but he (Lord Lyndhurst) was of opinion, on the authority of cases deliberately decided by that noble Lord himself, that the deed of separation before them could not affect the domicile, or any other condition inherent in the relation of husband and wife, or be any bar to the husband's suit, which was for a divorce (*m*). In the same case Lord Brougham asked what was the legal value or force of this kind of agreement in our law? Absolutely none whatever—in any court whatever—for any purpose whatever, save and except one only—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que* trust. In no other point of view was any effect given by our jurisprudence, either in law or in equity, to make a contract. No damages could be recovered for its breach, no specific performance of its articles could be decreed, no court, civil or ecclesiastical, can take notice of its existence (*n*).

16. In Westmeath *v.* Westmeath, where the bill was filed by the husband to set aside deeds of separation, it was

(*m*) See 2 Cla. & Fin. 561, 562.

(*n*) See 2 Cla. & Fin. 527, 528. See 12 Cla. & Fin. 339.

decided by Lord Manners, C., that a deed providing for a future separation between husband and wife was void, and from that part of his decree there was no appeal to the House of Lords; but Lord Lyndhurst, C., and Lord Eldon both expressed their clear opinion that the deed was against the policy of the law (*o*).

17. In the same case a later deed, dated 30 May 1818, for an actual separation, was executed between the parties, who, however, by a verbal agreement, continued for nearly a year to reside together in the same house and appeared to the world living together as man and wife, but, as it was alleged and sworn by the wife, without any cohabitation as husband and wife. Lord Manners, as to this deed, retained the bill for a year, with liberty to proceed at law. Upon an appeal to the House of Lords from this part of the decree, Lord Lyndhurst, C., said he was of opinion that where there was a deed of separation of this kind, but with a verbal stipulation that the husband and wife should continue to live in the same house together, although they should not cohabit as husband and wife, the deed could not in law be sustained; and in that opinion he followed the decision of the Court of King's Bench on this very case (*p*), but he thought it best to affirm the judgment, enlarging the time for retaining the bill, so as to allow the parties still to agitate the question of law if they should think fit. Lord Eldon declared that his present opinion was that the circumstances under which the parties lived together after the execution of this deed put an end to it (*q*). He thought it right, however, that the parties should be left to try the question at law, and that at present they ought not finally to relieve either party. Finally, although that does not appear from the report, it was on the 30th August

(*o*) 1 Dow, N. S. 519; I was of counsel for the appellant; Jac. 126. Wilson *v.* Muskett, 3 Barn. & Adol. 743; Cockburn *v.* Cockburn, 5 Hare, 397.

(*p*) Hindley *v.* Westmeath, 6 Barn. & Cress. 200.

(*q*) See Bateman *v.* Lady Ross, 1 Dow, 235.

1831 declared by the House that the deed of the 30th May 1818, in the pleadings mentioned, so far as the respondent, Lady Westmeath, or her trustees for her, sought or could seek any benefit under it, was null and void in law, and with this declaration the cause was remitted to the Court of Chancery in Ireland to do as should be just.

18. Where a deed of separation between a husband and his wife was prepared, and a third party entered into an agreement with the husband to pay certain sums to which the husband only was liable, and the consideration was stated to be the husband's executing the deed of separation and agreeing to pay certain demands and household expenses, and the husband afterwards executed the deed, the House of Lords, upon the opinion of the Judges and by the advice of Lord Campbell and Lord Brougham, affirmed the decision of the Courts below that the agreement was binding on the third party. There was no illegality disclosed by the agreement, for in the way it was presented on the record there was no illegality shown in the deed of separation, the execution of which was the consideration for the agreement (*r*). The foundation of the judgment, of course, was that a deed of separation is not necessarily illegal; and in this case no illegality was shown.

19. In a still later case of Wilson *v.* Wilson (*s*), all the authorities were reviewed by the Vice Chancellor, and he held that deeds of separation were valid, and that an agreement for separation with a view to put an end to a suit by the wife for nullity of marriage on the ground of impotency, was not contrary to public policy, and he accordingly decreed the execution of articles, by which it was stipulated that a regular deed of separation should be executed, making certain provisions for the wife, with costs, and he dismissed the husband's cross bill with costs, which sought to have the

(*r*) Jones *v.* Waite, 9 Cla. & Fin. 101; 1 Bing. N. S. 656; 5 Bing. N. S. 341; and see 14 Sim. 417.

(*s*) 14 Sim. 405.

articles delivered up as obtained by fraud and intimidation, being of opinion that no such case was made out; and this decree was affirmed in the House of Lords (*t*).

II. *As to legitimacy and control over the father.*

1. The prohibition in the Royal Marriage Act (*u*) against the marriages of certain members of the Royal family without consent, extends to a marriage solemnized abroad. The Judges in delivering their opinion, which was adopted by the House, laid down a general rule for construing Acts of Parliament.—The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble, which, according to Chief Justice Dyer (Plowd. 369), "is a key to open the minds of the makers of the Act and the mischiefs which they intended to redress" (*v*).

2. The rule of descent to English land is, that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit, and this is a rule of a positive inflexible nature, applying to and inherent in the land itself which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood to the last taker, or like the custom of gavelkind or borough-

(*t*) Printed Cases, D. P. 1848.

(*u*) 12 Geo. 3, c. 11; Sussex Peerage case, 11 Cla. & Fin. 85.

(*v*) 11 Cla. & Fin. 143, per Tindal, C, J.

English, which cause the land to descend in the one case to all the sons together, in the other to the youngest son alone. This was laid down by Tindal, C. J., in delivering the opinion of the Judges in Birtwhistle *v.* Vardill (*x*), and it was accordingly decided by the House of Lords that a child born in Scotland of parents domiciled there, who at the time of his birth were not married but intermarried afterwards there, and who was legitimate by the law of Scotland for the purpose of taking land, and for every other purpose, could not succeed to real estate in England as heir of his father. But this rule of the law of England was not established without a severe struggle. It was the opinion of the Court of King's Bench, and that opinion was supported by the opinion of the Judges, as delivered by Alexander, C. B., in the House of Lords upon a writ of error there. But Lord Brougham having expressed his opinion the other way in an ingenious and elaborate argument, the case was, after great delay, reargued before the House with the assistance of the Judges, whose unanimous opinion was delivered by Tindal, C. J., in an elaborate, learned, and convincing argument, in entire accordance with which (Lord Brougham not opposing, but still not satisfied) Lord Cottenham, C., moved the judgment of the House for the defendant in error, which was given accordingly, and thus this important point upon descent was settled for ever.

3. A child born *stante matrimonio* must be presumed to be legitimate, although the father some months before the birth of the child instituted proceedings for a divorce against his wife for adultery, and several months after the birth obtained a decree for a divorce (*y*).

(*x*) 7 Cla. & Fin. 895; West, 500; 9 Bligh, N. S. 32. Doe *v.* Vardill, 2 Cla. & Fin. 571; 5 Barn. & Cress. 438; Bowes *v.* Strathmore, 4 Wils. & Shaw, App. 89, n. 5; Munro *v.* Ross, 6 Bligh, N. S. 468; Lady Dalhousie *v.* M'Douall, 7 Cla. & Fin. 817; Munro *v.* Munro, ib. 842.

(*y*) Routledge *v.* Carruthers, 4 Dow, 392; Le Marchant's Gardner Case, 343; see 5 Cla. & Fin. 235.

4. In the Banbury Peerage case (*z*), Chief Justice Mansfield delivered to the House of Lords the opinion of the

(*z*) 1 Sim. & Stu. 153, to be corrected according to the *errata*. Le Marchant's Gard. Case, App. 443; and Nic. Treat. 181, 291.

"1st. That the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption.

"2d. That the fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *primâ facie* evidence that such child is legitimate. That in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question. That such *primâ facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as, by the laws of nature, is necessary, in order for the man to be, in fact, the father of the child. That the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary, by the law of England, that a physical fact be proved.

"3d. That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received, except it tend to falsify the proof that such intercourse had taken place.

"That such proof must be regulated by the same principles as are applicable to the establishment of any other fact.

"4th. That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place, at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child.

"5th. That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and the wife, at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was

Judges on the questions of legitimacy submitted to them in substance as follows: 1. That the presumption of legitimacy, the husband and wife not being proved to be impotent, and having opportunities of access, may be rebutted by circumstances inducing a contrary presumption. 2. That the physical fact of impotency, or of non-access, or of non-generating access, may be proved by such evidence as is admissible in every other case in which it is necessary that a physical fact be proved. 3. That after what amounts to proof of sexual intercourse, no evidence can be received, except to falsify such proof. 4 & 5. That sexual intercourse is presumed between husband and wife until that presumption is encountered by satisfactory evidence. 6. The Judges explained that by the words non-access they meant the non-existence of sexual intercourse (I).

the father to such child? and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child.

"The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife,' and we understand those expressions as applied to the present question, as meaning the same thing, because in one sense of the word 'access,' the husband may be said to have access to his wife as being in the same place or the same house; and yet under such circumstances as, instead of proving, tend to disprove that any sexual intercourse took place between them."

(I) The Judges also gave their opinion in favour of the admissibility of an entry in a Bible by the reputed father, in his own handwriting, and signed by himself, that the claimant was his legitimate son, although he declared that he made such entry for the express purpose of establishing the legitimacy of his son and the time of his birth, in case the same should be called in question after the father's death. No controversy had arisen when the entry was made. Mr. Baron Alderson in a later case (Walker *v.* Countess of Beauchamp, 6 Carr. & Pay. 552), held that the commencement of the controversy must be taken to be the arising of the state of facts on which the claim is founded, without anything more. In Reilly *v.* Fitzgerald, Dru. 122, Sir E. Sugden, C., considered that the Judges in the Berkeley Peerage case had expressed their opinion in a clear and solemn resolution, that the point of inquiry respecting the admissibility of such evidence is not the existence of a state of facts out of which a claim has arisen, but the existence of a

These rules were adopted by the House of Lords in the case before them. Lord and Lady Banbury were considered to be living together in the usual manner of husband and wife, but evidence of their actually sleeping together was discredited. Two children (sons) were born, one in 1627, 21 years after the marriage, the other, Nicholas, in January 1630; the claimant was descended from the latter. In 1629 Lord Banbury, by deed, made a provision for his wife, describing her as his good and loving wife. In January 1630, November 1631, and June 1632 they appeared together in public and levied fines, and in 1630 he made his wife residuary legatee and executrix of his will. All this was, of course, *primâ facie* evidence that Lord Banbury was the father of the child in question. But it was proved by argument and inference that Lady Banbury was guilty of adultery, and that she concealed from her husband the birth of the children. In 1628, upon a question of a right of precedency granted to Lord Banbury, the Crown, in a message to the Lords' Committee, stated that the Earl was old *and childless* as a reason why he might be permitted to hold it during his time. In 1630 and 1631 Lord Banbury made such dispositions of his real estates as it was insisted he would not have done had he known that he had issue male living, and by an inquisition held about 11 months after his death it was found that he died without heirs male of his body, and it was found who the next heirs were (I). Lady Banbury married Lord Vaux shortly after Lord Banbury's death; the children were acknowledged by Lord Vaux, and Nicholas, who survived his elder brother (although there was no register of baptism), was born in Lord Vaux's house, and was called originally by the name of Vaux, although he afterwards assumed the title

controversy or dispute respecting that claim, and he decided accordingly. This has been followed in Ireland. There was an appeal to the House of Lords from the decree in Reilly *v.* Fitzgerald, which dropped for want of prosecution.

(I) By a second inquisition in 1641 the jury found that Edward, the eldest son, was Lord Banbury's son, and next heir at his death.

of Banbury, and Lord Vaux by settlement provided for this child (*a*), who was described as Nicholas, now Earl of Banbury, son of the said Countess of Banbury, heretofore called Nicholas Vaux, or by whichsoever of the said names or descriptions, or any other name or description, the said Nicholas be or hath been called, reputed, or known. These circumstances were considered sufficient to rebut the presumption of legitimacy (I), and accordingly (Lord Erskine dissenting) the claim was rejected upon the advice of Lord Eldon, C., Lord Redesdale, and Lord Ellenborough, C. J.

5. In the Gardner Peerage case (*b*) the House of Lords acted upon the same rules. An attempt was made to prove that Captain Gardner, the husband, could not be the father of the child in the course of nature, in consequence of the interval which had elapsed between his leaving England and the birth of the child, and there was evidence from the conduct of the parties to rebut the presumption of legitimacy: the adultery was proved; the birth of the child was sedulously concealed from the husband; he was called by the name of the adulterer, who reared him, educated him, and finally provided for him, and the adulterer married Mrs. Gardner the instant the divorce was obtained. Upon these grounds Lord Eldon, C., thought there was enough to bastardize the child without reverting to the evidence or entering into a discussion as to the *ultimum tempus pariendi* (*c*).

6. In the later case of Morris *v.* Davies (*d*), the contest was for property. The husband and wife had an only child, a daughter, and, having been married 10 years, separated,

(*a*) See 5 Cla. & Fin. 245–250, 265–269.

(*b*) Le Marchant's Rep.

(*c*) See 5 Cla. & Fin. 264, 253, 254.

(*d*) 5 Cla. & Fin. 163. See Nic. Adult. Bast. 216; Hargrave *v.* Hargrave, 9 Beav. 552; Barony of Saye and Sele, 1 H. of L. Cas. 507.

(I) The principal facts are collected as they were relied upon by the law Lords against the claim, but several of them are disputed or explained by Sir H. Nicolas, Adult. Bast. 291, 551.

and a regular deed of separation was executed: they thenceforth lived in different places, but it was not disputed that the husband was in the habit of going from time to time from his own place to her's, and that upon some of those visits he in company with her gave directions with respect to the conduct and management of their property there, and upon more than one occasion he was in her house, and that he sometimes walked with her (*e*); in short, there were sufficient opportunities for sexual intercourse, had such been the desire of the parties: there was evidence to carry the case much further, but that was discredited or explained, and with reference to the rule of law it is not necessary to examine it. The wife was delivered of a son a few years after the separation, who, it was alleged, was the child of a servant of the name of William Austin, whom she had taken with her when she separated from her husband. Her adulterous connexion was not denied; her concealment of the birth of the child from her husband was admitted, and it was proved that when the rumour reached him and he appealed to her, she denied the existence of the child; the husband, when the existence of the child came to his knowledge, did not provide for it, but whilst he was angry with his daughter, bequeathed his property to a nephew and other relations, and when he became reconciled to her, bequeathed it to her, taking no notice of the boy. On the other hand, Austin took the child the moment after it was born to his father's, 30 miles off; it was baptized as base born by the name of Evan Williams, but with a note that he was supposed to be the child of a son of Edward Austin, a weaver of that place; the boy was sometimes called Williams and sometimes Austin; Austin, the alleged father, and the wife, provided for him; he was treated as Austin's son, and Austin, although his parents were in indigent circumstances, left all the property which he had acquired to the boy. The point made by counsel for the legitimacy was, that by the rule of law no

(*e*) See 5 Cla. & Fin. 211.

evidence was admissible to disprove sexual intercourse having taken place, when the opportunity is proved to have existed, the husband and wife being proved to have been within the same house (*f*), and it was contended that this point was not decided in the Banbury peerage case, and that it was contrary to the principle of all the cases on the subject; but Lord Cottenham, C., and Lord Lyndhurst (who when Chancellor decided in the Court of Chancery against the legitimacy), held that the point was decided by the Banbury peerage case, and the House accordingly affirmed Lord Lyndhurst's decree, but without costs. Lord Lyndhurst, in the course of his argument, observed that the presumption of law [in favour of legitimacy] was not lightly to be repelled. It was not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive (*g*).

7. A father has of course the right to the care and custody of his children; he is intrusted with the care of his children because it is supposed that he will best execute the trust reposed in him; for it is a trust, and of all trusts the most sacred. But if he abuse the trust, a right devolves to the Crown as *parens patriæ*, and it is the duty of the Crown to see that the child is properly taken care of. And this right is delegated by the Crown to the Chancellors sitting in the Court of Chancery. So if the father appoint a guardian under the statute, that is a trust; but if the father abuse the power vested in him, which is in the nature of a trust, if he appoint improper persons to be guardians of his children, a court of justice can interfere, and can prevent that misapplication of the father's power. If, on the contrary, the father has been deceived, and has appointed a person improper to be guardian, the Court will in like manner interfere to control the conduct of the guardian. All this—which is clearly law—was laid down by Lord Redesdale in the course of his speech in Wellesley *v.* Wellesley in the

(*f*) See 5 Cla. & Fin. 244, 240. (*g*) Ib. 265.

House of Lords. In that case, the father had been living in adultery during his wife's lifetime, and still continued the connexion, and encouraged his children in swearing, &c.—but of course it is unnecessary in these pages to enter into the particulars of the evidence—and Lord Eldon, C., made an order, referring it to the Master to appoint some person other than their father guardian to the children, and restrained the father from removing them from the custody of their maternal aunts (*h*). From this order there was an appeal to the House of Lords, and upon the advice of Lord Redesdale, Lord Manners, and Lord Lyndhurst, C., the order was affirmed (*i*). Lord Manners, in observing upon the adultery, added that he did not state this for the purpose of insisting that the mere act of adultery, or the living in a state of adultery on the part of the father, is sufficient to warrant the separation of the children from their parent. He did not state such to be the case. If that case should arise, then it would be time enough to give an opinion on it.

(*h*) 2 Russ. 1.
(*i*) 2 Bligh, N. S. 124; 1 Dow, N. S. 152.

CHAPTER II.

OF WILLS.

SECTION I.

OF WILLS.

1. *Relief against spoliation by heir at law.*
2. *Relief against revocation by act with advice of heir-at-law, an attorney.*
3. 4. 5. *Partial relief, by striking out portions of the will: undue influence or mistake.*
6. *Abandonment of will by devisees.*
7. *What letters admissible on a question of competency.*
8. *Will, how proved in equity.*
9. *Parol evidence inadmissible to enlarge gift: devise of my estate of Ashton confined to Ashton.*
10. *Parol evidence admissible to prove name of estate, and parcel or not parcel.*
11. *Doe.* v. *Lord Jersey accordingly.*
12. *But not to prove omission of estates by mistake.*

 Newburgh v. *Newburgh: words introduced by mistake of the draftsman.*
14. *Effect of omission by mistake.*
15. *Lord Camoys* v. *Blundell: mistaken description corrected by the context.*
16. *The opinions upon the appeals.*
17. *The extent to which parol evidence was received.*
18. *Clear gift in will not revoked by ambiguous words in codicil.*
19. *Nor further than is necessary to effect disposition in codicil.*
20. *But a codicil may operate as a new disposition, although in words it only gives what is not disposed of by the will.*
21. *Lord Hardwicke* v. *Douglas, acc.*

1. WHERE there is sufficient ground to presume that a man made a will, and that his heir-at-law destroyed it, the Court, with the assistance of a jury, may set up the alleged will, although no proof is produced of its actual execution, and the jury may in effect *fill up the blanks in a draft of the will.* This was decided in Holland *v.* Holland (*a*), where Mr. Holland, an attorney, had made a will in 1799, which subsequent acts had affected, and which after his death was found in an open drawer of an old desk, enclosed in an

(*a*) Printed Cases, D. P. 1826, MS.

envelope, the seal of which was broken. After purchasing an estate of some value in 1818 he dictated a will to a clerk, and had a copy made of it, which he laid before an eminent counsel who settled it, but no proof of the execution of any such instrument as a will was produced, and advertisements had been published for the will or witnesses without success. Mr. Holland died in the spring of 1820 from the effects of a fall, after two or three days illness. In the interval in answer to questions he spoke as if he had by will settled his affairs, and expressed himself harshly of his eldest son upon its being suggested that he had not made a proper provision for him. The second son was his favourite, in favour of whose children principally the gifts in the draft will were. The eldest son, who was a solicitor, whilst his father was lying ill, and in the absence of his brother, twice opened his father's desk by means of a locksmith, and each time had it relocked, and after his father's death when a regular search was made for a will, and it was discovered that the lock had been tampered with, declared solemnly that he had not touched the lock or been before, since his father's illness, in the office. He took with him a young gentleman, and from his evidence it might be inferred that one of the papers which he took away was a will. He possessed himself of documents of title, papers, money, and bankers' receipts, and whilst his father was living endeavoured to obtain the money for the receipts from the bankers. The second son and his children filed a bill against the eldest son, and prayed an issue to try whether any will was executed, and what were its contents. The Court directed two issues: 1. Whether the father at any time, subsequent to the 1st August 1819, duly executed his will in writing, with the formalities necessary to pass real estate, and if so, of what tenor, import, and effect. 2. Whether the defendant suppressed or spoliated such will. The jury found, after two days trial, that the father did make such a will, and they set forth its tenor and effect (according to

the draft). After a motion to set aside the verdict had been refused, a decree was made establishing the title of the plaintiffs, and referring it to the Remembrancer to inquire what lands and premises had been so devised under the general words in the several devises in the finding of the jury mentioned, and where the lands and premises were situated, and the estate or interest of the testator therein at his death, and directing the defendant to execute a proper conveyance. All the costs were thrown on the defendant, the eldest son. From the orders and from the decree he appealed, and he described the decree as one which indirectly, but effectually, pronounced against him for the imaginary spoliation of an imaginary document. The case was fully argued, according to my note. I cited for the respondents, Saltoun *v.* Melhuish, Ambl. 249. All cases for relief against spoliation come in a favourable light, but, notwithstanding the rule that things are to be taken in *odium spoliatoris*, yet a party is only to have the same benefit as if the instrument existed: Dalston *v.* Coalsworth, 1 P. W. 731. In Cowper *v.* Lord Cowper, 2 P. Wms. 748, there was only the *presumption* of a release from circumstances. In Hampden *v.* Hampden, 3 Bro. P. C. 550, a will suppressed was taken, as stated by the bill, until the defendant should produce it. So in Saxon *v.* Rumsey, 2 Vern. 561, a man burnt the articles made on his marriage; he was not discharged out of custody until he consented to admit that the articles were to the effect mentioned in the bill. In the course of Mr. Heald's argument for the appellant the Lord Chancellor observed, that the will was full of blanks, and asked how they were to be filled up; to which the counsel for the respondents replied, by the finding of the jury. After time taken to consider, the appeal was dismissed, with 100*l.* costs. This is a most important decision, and was fully authorized by the facts and the authorities. Yet we cannot but feel the difficulty of finding in such a case that a will had been duly executed in the presence of

and attested by three witnesses, for the period was but short and recent in which such a will could have been so executed by the testator, and his offices were in Dublin and Limerick, and he was an experienced practising solicitor, surrounded by clerks and friends, none of whom had attested a will, or was aware that any other person had. The jury also filled up the blanks in the draft of the will, and appear to have substituted in favour of the widow 250*l.* a year in lieu of 200*l.* a year, which was in the draft, upon the evidence of the eldest son's declaration, that the widow's provision was 250*l.* a year; so that they did not confine themselves wholly to the draft which was proved.

2. The next case of relief against an heir-at-law was of a still more extraordinary character. It was ultimately decided upon the question whether an attorney is bound to know the legal operation of an act by his client, in which he professionally assists, and to inform the client of the effect of the act, or in default, whether he would not become a trustee for the disappointed devisee under a will revoked by the act, of any property which he may take as heir-at-law of his client. I allude to the case of Bulkley *v.* Wilford (*b*). General Wilford was owner of the Ranelagh estate, part of which he had contracted to sell; he then made his will, and gave all his property, real and personal, to his wife. It was proper to levy a fine of the part of the property sold, and the fine was properly extended to the rest of the estate held under the same title. The fine was required by the purchaser's solicitor. Mr. Bulkley was the attorney employed by the General in the sale, and was his heir presumptive, but the will had been drawn by other solicitors whom the General was in the habit of employing in preparing testamentary papers, and Mr. Bulkley was not, as he swore, aware that there was a will, nor was there any proof of his knowledge; neither was he certain that he was the heir, and

(*b*) 2 Cla. & Fin. 102; 8 Bligh, N. S. 111. See Allen *v.* M'Pherson, 1 H. L. Cas. 191.

he swore that he was not aware that a fine would revoke a will, and there was some evidence in support of that statement. The General died shortly after the fine was levied, and Mr. Bulkley proceeded to recover the estate as heir-at-law. Much, at first, turned upon the question of Mr. Bulkley's knowledge of the effect of a fine, upon which it is not now necessary to remark. The widow filed her bill for relief, and Sir John Leach directed two issues; 1, Whether Bulkley fraudulently induced the General to extend the fine to the whole of the property; 2, Whether he fraudulently omitted to inform the General that such fine would revoke any prior will. The Vice-Chancellor was of opinion that Bulkley, as an attorney, was not bound to know the legal operation of a fine on a prior will, and for that reason the second issue was not simply whether he omitted to give the information, but whether he fraudulently omitted to do so. This decree was affirmed by Lord Lyndhurst, C., on appeal. Upon the trial of the issues the jury found that Bulkley did not fraudulently induce the General to extend the fine, but that he did fraudulently omit to inform the General of the operation of the fine. Lord Tenterden on the trial laid it down clearly, and told the jury that they ought to presume that Bulkley knew the effect of the fine. Lord Lyndhurst decreed Bulkley to be a trustee for the widow. Upon an appeal to the House of Lords from the orders and decree, Lord Lyndhurst and Lord Brougham, C., took no part in the case. Lord Eldon, supported by Lord Wynford, delivered his opinion, and the appeal was dismissed with costs. Lord Eldon was of opinion that no issue ought to have been directed, but that the decree in favour of the widow should have been made at the hearing. He relied on the case of Segrave *v.* Kerwan, Beat. 157 (*c*), where a barrister who drew a will for his client and friend, and was made an executor, in which character he became entitled to the personal estate, was declared to be a trustee for the next of kin, as

(*c*) See 1 Bligh, N. S. 458.

the office only was intended for him, and he had not informed the testator of the legal effect of appointing an executor. And he laid it down as a principle, that assuming the attorney's ignorance of the operation of a fine, and his want of knowledge that he was heir, he should not take advantage of his own ignorance. It was too dangerous, he added, to the interests of mankind, that those who are bound to advise, and who, being bound to advise, ought to be able to give sound and sufficient advice, should be allowed to take advantage of their own professional ignorance, to the prejudice of others. Lord Eldon thought, upon the policy of the law, that the omission to inquire whether there was a will, or the alleged ignorance of the effect of the fine, formed sufficient grounds of equity for a decree against the appellant.

The case was decided ultimately upon a safe and intelligible ground. Attornies in actions for negligence are not held responsible where the case turns upon a point of law (*d*); but here the question was not whether the attorney should be answerable in damages, but whether he should disappoint the disposition of his client in favour of his wife, by claiming as heir-at-law an estate which only descended to him in consequence of his ignorance that a fine would revoke a prior will, or, if he was aware of the rule of law, of his fraudulently or carelessly omitting to communicate that knowledge to his client, whose heir presumptive he was. If this view of the case had been taken in the court below it would not have been necessary to direct any issue.

3. Where undue influence has been exercised in obtaining a will, still the whole of the will may not be void, but only the portions of it obtained by undue influence. Lord Redesdale in the House of Lords cited a case where the jury found that the whole of the will was not the will of the testator. The person who framed the will had introduced himself as the ultimate devisee; the jury found the rest of

(*d*) See Purvis *v.* Landell, 12 Cla. & Fin. 91; and see Wallace *v.* Patton, 12 Cla. & Fin. 491, as to his own rights.

the will to be the will of the testator, but the ultimate devise they found not to be his will (*e*). Lord Eldon, referring to the same case, said that the direction given by the Judge (whether right or wrong was another thing) was this, "You are to consider whether that part of the will is fraudulent, but it does not follow if it is so, all the rest of the testament may not be confirmed;" and he referred to the case of Mr. Barnard, of South Cave, where the jury determined that the paper contained the will of the testator, holding at the same time that a considerable part of that which appeared upon the face of the will was not any part of the will of the testator (*f*) (I). In Lord Trimlestown *v.* Lloyd (*g*), which was, I believe, ultimately compromised, where the late Lord Trimlestown had made several testamentary dispositions at different periods, and ultimately one in which were large provisions for his wife, and which last

(*e*) 1 Bligh, N. S. 447, 449, 457, 458.

(*f*) Ib. 476.

(*g*) 1 Bligh, N. S. 427; 1 Dow, N. S. 85. See Lloyd *v.* D'Alton, Printed Cases, D. P. 182.

(I) A court of equity cannot set aside a will of personalty for fraud, although it may, in certain cases, hold the executor or legatee to be a trustee for another. In Allen *v.* M'Pherson, 1 H. L. Cas. 191, the bill was filed to have the executors or residuary legatee declared trustees for a legatee in the will and early codicils, but whose legacies had been greatly reduced by a last codicil, to the amount of the gifts revoked, upon the ground of undue influence and false representations by and at the instance of the residuary legatee; and the bill alleged that the Court had granted probate of the will and all the codicils, without allowing the legatee to go into any objection relating solely to his own case, and restricting him to objections which would affect the last codicil as an entire instrument. To this bill there was a demurrer, which was overruled by Lord Langdale, M. R., and upon an appeal his order was reversed and the demurrer allowed by Lord Lyndhurst, C., on the ground that the jurisdiction on appeal was in the Privy Council, and not in the Court of Chancery. Upon an appeal to the House of Lords the order of Lord Lyndhurst was affirmed upon the advice of himself and Lord Brougham and Lord Campbell, but opposed by Lord Cottenham, C., and Lord Langdale. The case is one of great interest: the writer inclines to agree with the decision of the Lords.

will was impeached on the ground of undue influence, Lord Redesdale observed, that supposing the last will to have been made under the influence of Lady Trimlestown, so as to affect it with reference to the large provisions made for her by that will, that could not possibly affect the dispositions made in favour of the rest of the family, so that the jury, if they had conceived that that influence had been carried to an improper length, ought not to have found against the whole of the will. If, on the contrary, it appeared to them that the whole of that will had been improperly obtained, it then became a question whether the prior will was not to be considered as the disposition of Lord Trimlestown. The House was of opinion and directed that the question to be tried was whether by all, or any, and which of the several instruments alleged to have been executed by Lord Trimlestown as testamentary instruments, *or by any and what part or parts thereof respectively*, he did devise all, or any, and what part or parts of his real estates, and in what manner, and by what words. Such a form of an issue is not free from objection. It seems to be more advisable to ask the jury by separate issues, whether the several parts objected to are the will of the testator (*h*).

4. In the course of the argument in the House of Lords of the case of Newburgh *v.* Newburgh (*i*), Mr. Heald, for the appellant, was asked by Lord Eldon, C., whether there was any case in which an addition had been made to a will. Hippisley *v.* Horner was quoted. The Lord Chancellor said, I have known cases in which matter has been struck out of a will improperly inserted in it. If you insert a clause in a will, how are you after his death to have that attested by

(*h*) Hippisley *v.* Horner, Turn. & Russ. 48, n., with the form of a decree where part of the will is found not to be the will of the testator. Powell *v.* Mouchett, 6 Madd. 216, afterwards, I think, before Lord Eldon; Lord Guillamore *v.* O'Grady, 2 Jo. & Lat. 210, which was compromised.

(*i*) Printed Cases, D. P. 1825; 8 Bing. 254; 5 Madd. 364, *post*, pl. 5.

three witnesses? Mr. Heald observed that the House would only be required to strike out a clause (*j*).—Lord Chancellor: The cases I allude to were all cases in which it was struck out on the ground of fraud. In a further part of the argument the Lord Chancellor asked, Are you to direct the Judge what evidence he is to receive? Hippisley *v.* Horner is not worth twopence (*k*).

5. In the above case of Newburgh *v.* Newburgh, Lady Newburgh's cross bill was filed in order to have the word "Gloucester" supplied, by parol evidence of the mistake. That having failed in the court below, the counsel then discovered that by the *omission* altogether of two lines introduced by Mr. Butler, (which were intended to contain an enumeration of all the estates in the term of 2,000 years, but which omitted "Gloucester,") the will would convey all the estates to Lady Newburgh, according to the intention. But the Vice-Chancellor held that the frame of the bill was in direct opposition to that view of the case (*l*). If this view had originally occurred to Lady Newburgh's counsel, and the bill had been adapted to it, evidence would have been tendered to establish the mistake. But this is a dangerous jurisdiction: for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, although inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation, made through carelessness or ignorance, could be corrected by striking out the words improperly introduced (*m*).

6. If whilst the witnesses to a will are living and the facts capable of investigation, the parties interested have, under advice and after full investigation and protracted litigation, deliberately abandoned the will as invalid, and yet a jury

(*j*) See 5 Madd. 367.
(*k*) This expression I wrote down at the time it was uttered.
(*l*) See 5 Madd. 367.
(*m*) *Post*, pl. 12.

upon an issue *devisavit vel non* find a verdict in favour of the will, when all the witnesses who could have spoken to the transaction were dead, upon the production of one part of the will, it being proved that there was another part which was not produced, such a finding could not be acted upon, and indeed no such issue ought to be directed (*n*).

7. In an issue and in an action (*o*), where the competency of the testator was in question from his attaining 21 in 1779, down to the time of making his will and codicil in 1822 and 1825, many letters addressed to him by various persons were found with other papers in a cupboard under his bookcase in his private room; to many of these letters answers had been written and sent in the handwriting of and signed by the testator, and upon some other of the letters there were endorsements in his handwriting, and which letters so answered and endorsed were of course received in evidence. The controversy was whether the three following letters were admissible, viz. 1. A letter from a relative in America in 1784 with the regular post mark, which was open, and the seal broken, and which was in terms addressed to a sane person; the acquaintance of the testator with the writer was proved, and the latter had been long dead. There was admitted in evidence a draft or copy of a letter in 1787 from the testator to the writer of the above letter, but not in answer to it. 2. A letter to the tastator in 1786 from a neighbouring vicar, an acquaintance of the testator, recommending him to send his attorney to some parties with a view to a compromise of a dispute, and upon which there was an endorsement by the testator's attorney of its being a letter from the vicar to the testator, and both the vicar and attorney were long since dead. 3. A letter in 1799 from a curate who had for several years

(*n*) Lord Lorton *v.* Lord Kingston, 5 Cla. & Fin. 269, per Lord Chancellor.

(*o*) Wright *v.* Tatham, 5 Cla. & Fin. 670; 4 Bing. N. S. 489. See 2 Russ. & Myl. 1; 1 Adol. & Ell. 3; 7 Adol. & Ell. 313, 331.

been curate of a chapelry, to which the testator had appointed him, and who had also long since died, in which the writer in warm terms of respect and affection expressed his gratitude when he was about to relinquish this preferment. Upon this simple question the Judges could not agree. Six were of opinion that none of the letters was admissible; three thought that all of them were admissible, and three held that the letter endorsed by the attorney was alone admissible. It should be stated that there was no proof that the testator had seen or read any of these three letters, or that he deposited, or knew of their deposit, in the cupboard, or that he had been seen to use it as a place of deposit. It was not, one learned Judge observed, even alleged that he was in the habit of receiving or reading letters addressed to him, or that in the whole course of his life he ever read a letter so addressed (*p*). It was laid down that every act of the party's life was relevant to the issue; of course therefore it was laid down, anything which he could be shown to have done in regard to any written document being evidence, it follows that such written document must itself be received, otherwise the true character of the act which he had done in regard to it could not be properly estimated, or the jury be enabled to judge how far that act was or was not indicative of the state of his mind (*q*). If the testator had made an endorsement on any of the letters, the contents of the letters would have been receivable, but only for the purpose of showing that the endorsement was a rational act, not for the purpose of showing the opinion of the writer. All inferences from acts which assume the competency of the agent are to be excluded, for that being the matter under discussion, to assume it, and to draw any inference from such assumption which may help to prove the competency, is to reason in a circle. On the

(*p*) 5 Cla. & Fin. 696; for *alleged* we should perhaps read *proved*, for some of the letters he endorsed and some he answered.

(*q*) Ib. 715.

other hand, neither fraud nor the want of competency is to be presumed (*r*). The Judges, whose opinions were against the admissibility of the evidence, held: 1. That the letters were only opinions, not on oath, and that they were not improved by the deaths of the writers. 2. That they were not to be considered as acts of treatment exhibited by the writer towards the testator (*s*). 3. That they were not explanatory of acts done by the testator. The same rules were held to extend to the letter endorsed by the attorney. If the testator was capable we ought, it was said, to infer that he had sent or caused that letter to be sent to the attorney. If the testator was incapable we ought to conclude that some other person acting upon his behalf had sent it to the attorney. The fact of its being in the attorney's possession is equally consistent with either supposition, and therefore when it is the question whether the testator were capable or not, the foundation that the endorsement of the attorney necessarily proves an act done by the testator fails altogether. And if no act be proved to be done, then the contents of the letter, which are only admissible to explain an act, are not receivable at all (*t*). Upon these grounds the letters were held by the House of Lords to be inadmissible as evidence. The reasons in favour of their admission, which it were useless now to consider, were however well calculated to leave the mind in doubt, but the learned Lord who moved the judgment of the House said he never saw a clearer case, or one calling for a more unhesitating expression of opinion.

8. In Bullen *v.* Michel (*u*), Lord Eldon, C., pointed out the distinction between proving a will at law and in equity. We send, he observed, issues out of the courts of equity, and they proceed upon them as they usually do at trials at *nisi prius*, and think that sufficient on issues out of courts

(*r*) 5 Cla. & Fin. 694, 715, 723.
(*s*) See particularly 5 Cla. & Fin. p. 747.
(*t*) Ib. 723, 724.
(*u*) 4 Dow, 330, 331.

of equity. For instance, in cases of wills, where the subject in question may be of the greatest consequence, we send the matter for trial upon an issue *devisavit vel non*, and a court of equity is not satisfied unless the will is proved by the three subscribing witnesses. They, however, usually call one witness who proves the signing by the testator, and the attestation of himself and the others in the testator's presence, leaving it to the other side, if they think proper, to call the other witnesses for reasons understood among themselves; and then it has been said the issue must be tried over again, which shows on what foundation the thing proceeds, and that issues out of courts of equity depend on different reasons, and lead to different conclusions from those of issues in trials between man and man.

9. Parol evidence is not admissible to show that a devise of lands at or of a particular place was meant by the testator to include other lands in different places. This was decided in Doe *v.* Sir Arthur Chichester (*x*). The devise was "of my estate of Ashton," which was held to be the same as "my estate at Ashton." The testator had two estates, one which he inherited from his mother, which consisted of the manor of Ashton and estates in the parish of Ashton, and of lands in neighbouring parishes. The paternal estate was called the Youlston estate. The parol evidence tendered was to prove, by the person who wrote the will, the testator's direction to give to the devisee his Ashton estate, and by other means to prove that the testator used to call his late father's property his Youlston estate, and his late mother's his Ashton estate; and this evidence was rejected below, and the Judges being of opinion that it was properly rejected, and Lord Eldon, C., agreeing with them, the judgment was affirmed. The ques-

(*x*) 3 Taunt. 147; 4 Dow, 65. See 8 Bing. 254; Doe *v.* Greening, 3 Mau. & Selw. 171; Doe *v.* Lyford, 4 Mau. & Selw. 550; Doe *v.* Holtom, 4 Adol. & Ell. 76; Doe *v.* Lord Jersey, 1 Barn. & Ald. 550; 3 Barn. & Cress. 870; Press *v.* Parker, 2 Bing. 456.

tion was stated to be, whether when *lands at a particular place* are devised, extrinsic evidence may be received to show that the testator included lands out of that place. The testator, it was true, had other lands which came to him along with his estate of Ashton, but they were not therefore comprised in the words "my estate of Ashton." If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of these counties; and, for the same reason, when the testator here describes the lands as his estate of Ashton (I), you cannot receive extrinsic evidence to extend this to other lands not of Ashton. We cannot fail to observe that as the words *of* or *at* Ashton were held to be equivalent (*y*), the proposed evidence was not to show what was parcel of an estate known by the name of Ashton, but to add to the devised estate at Ashton other estates not in that place.

10. But a property may have acquired a name, and be known to the owner by that name, and in such a case, a devise of it, not by terms of locality, but by its known name, will pass portions which would not have passed if the description had been by place. The distinction is a sound one, and, of course, parol evidence may be given to prove that the estate was known by the name, and of what it consists.

11. This is the case of Doe *v.* Lord Jersey (*z*), where the action of ejectment brought by Mrs. Vernon's heir-at-law was to recover lands in the county of *Brecon*. There was a special verdict, which found the will of Lord Mansel, and the marriage settlement of his daughter, Mrs. Vernon, to which schedules of the property were annexed. Under the

(*y*) See 4 Man. & Selw. 555.

(*z*) 1 Barn. & Ald. 550; and see Man *v.* Ricketts, 7 Beav. 93; affirmed in D. P. 1848, *nom.* Ricketts *v.* Turquand, without calling upon the respondent's counsel; 1 H. of L. Cases, 472.

(I) Does this reason apply to this case?

head of the Brecon estate a parish was named which contained the lands in question, and under the head of Glamorganshire estates was a parish called Briton Ferry. The estates in the county of Brecon, together with the manors and tenements in the county of Glamorgan, had been known by the name of the Briton Ferry Estate, and by no other name, for divers, to wit 50 years, before the death of Mrs. Vernon (*a*). The Glamorgan estates contained 30,000 acres, part of them consisting of the messuage and lands in the parish of Briton Ferry, comprising the whole of the parish; and the Brecon estates contained 4,000 acres. There were six advowsons, whereof the advowson of the parish of Briton Ferry was one, and one manor, and one-sixth of another manor in the county of Glamorgan: there was no manor of Briton Ferry, and there was no advowson or manor in the county of Brecon. This was the substance of the special verdict, but at the trial at *nisi prius* the plaintiff tendered a bill of exceptions as to the admission of evidence on the part of the defendant, the devisee of Mrs. Vernon, whose will was made under a power in the settlement. The evidence objected to, which was received, consisted of account books of stewards, then dead, in which they charged themselves, and in which was this entry: "Briton Ferry estate, in the county of Brecon;" and of proofs that the lands sought to be recovered, together with the lands, &c. in the said schedules contained, had all gone by the name of the Briton Ferry Estate, and that such of the lands as were in the county of Brecon extended over 12 parishes, and contained above 4,000 acres of land (*b*).

This being the situation of the property, we must now turn to Mrs Vernon's will, upon which the question arose: First, she gave and appointed, subject to the estate for life of her husband therein, "all that her Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands,

(*a*) See 3 Barn. & Cress. 874, n.
(*b*) See 3 Barn. & Cress. 870. See 1 Barn. & Ald. 553, 554.

tenements and hereditaments thereto belonging, or of which the same consists, with the appurtenances," unto Lord Clarendon for life, remainder to Lord Jersey's second son in fee, taking upon them the surname of Mansel, and endeavouring to obtain that peerage. She then gave her Penlline Castle estate, "which, as well as my Briton Ferry estate, is situate, lying, and being in the county of Glamorgan," with all the manors, &c. thereto belonging, to other persons. The case was argued upon the special verdict; and it was insisted that the second devise showed that only what was in the county of Glamorgan was to pass; and that even without that explanation nothing could pass but the lands situate at the place called Briton Ferry. Lord Ellenborough observed that the description in the will was not a description by place, but by name, and comprehended all that passed under the aggregate name, and the special verdict told what that was. Mr. Justice Holroyd, upon Doe *v.* Oxenden being cited, observed that the words there used were a local description, and were so considered by Gibbs, C. J., in pronouncing the opinion of the Judges in the House of Lords. Abbot, J., thought that the words in the second devise were words of affirmation, and not of restriction, for *all* the Briton Ferry estate was devised, and the words in the latter devise, which related to a different estate, were words of suggestion. In giving judgment for the devisee, without hearing counsel on his behalf, Lord Ellenborough said there was a clear devise by name of the Briton Ferry estate, and no case had been cited to show that it was not sufficient to describe an estate by its aggregate name, and therefore he had no doubt that the whole of the Briton Ferry estate passed by this description in the will. Mr. Justice Bayley relied upon the words "with all the manors, advowsons, &c.," which made it clear that the devise could not be confined to that part of the estate within the parish of Briton Ferry, for there was there no manor and only one advowson. Upon a writ of error in the House of Lords, Abbot, C. J., delivered the

opinion of the ten Judges who heard the argument. They were of opinion, that the words "all that my Briton Ferry estate, with the manors, &c." denoted a property or estate known to the testatrix by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry, and consequently that a question arising upon any particular tenement was properly a question of parcel or no parcel, and they therefore thought the several matters offered to be given in evidence on the part of the defendant were admissible, and ought to have been received; they also thought that the particular description and enumeration in deeds of particulars, by situation and names, was not inconsistent with a name of the whole as composing an aggregate mass. The whole of an estate may be known by one name, and each of its parts by its own particular name. But they thought that it was not sufficiently found that the tenements and manors were so known by name by the testatrix; in truth it was not found that they were so known by name to any person at the time of making the will; it would not be inconsistent with the finding that her knowledge should have had its commencement after the will, or should have terminated, and the name have fallen into disuse long before the making of the will, and therefore they were not able to say whether Lord Jersey's second son did or did not take any estate in the lands in question. Whereupon the Lords reversed the judgment in the King's Bench, and annulled the verdict of the jury, and directed the Court to award a *venire de novo* (*c*). The House of Lords therefore did not decide the important points in this case, but there can be no doubt, if the verdict had been more explicit, that the opinions of the Judges in favour of the devise passing all the estate, and of the admissibility of parol evidence to prove what was parcel of it, would have been acted upon. In a later case in the Court of Chan-

(*c*) 3 Barn. & Cress. 570; Printed Cases, D. P. 1825.

cery, Lord Eldon referred to it as a case relative to lands in Brecon, where it was found that in the accounts of what was called the Briton Ferry estate, which was mentioned as situate in a certain Welsh county, were comprised the accounts not only of the estate situated in that county, but also of certain lands in an adjacent Welsh county, and the Judges, he added, were of opinion that that evidence was proper to be received, and which opinion he applied to the case before him (*d*). The principle is sufficiently clear, but the distinction is a thin one, between a devise of "my estate *of* Ashton" and one of "my Briton Ferry estate;" it is perhaps to be regretted that the former was considered as tantamount to a devise of "my estate *at* Ashton," instead of construing it, according to common parlance, as my estate called Ashton, or my estate of [that is, of the name of] Ashton.

12. In Newburgh *v.* Newburgh (*e*), the conveyancer, in settling the will of Lord Newburgh, had struck out by mistake the word "Gloucester" in a devise to the wife of the testator's estates in the counties of Sussex and Gloucester, and the word "counties" was then altered by the copying clerk into "county;" it was held both by Leach, V. C., and Lord Eldon, C., that parol evidence was inadmissible to prove the mistake. Upon an appeal to the House of Lords the Judges were unanimous that the parol evidence could not be received, but the case was ultimately decided by the House upon the true construction of what still appeared on the face of the will. Upon the question of parol evidence I cited for the respondent Towers *v.* Moor, 2 Vern. 98; Seymour *v.* Rapier, Bunb. 28; Lord Walpole *v.* Lord Orford, 3 Ves. 402; 7 T. Rep. 138; Kelly *v.* Powlett, Ambl. 605, 1 Bro. C. C.

(*d*) Okeden *v.* Clifden, 2 Russ. 309.

(*e*) Printed Cas. D. P. 1825. See 8 Bing. 254; 5 Madd. 364, *supra*, pl. 4; and see Miller *v.* Travers, 8 Bing. 244; Doe *v.* Martin, Richardson *v.* Watson, 4 Barn. & Adol. 771, 787.

476; Doe *v.* Bland, 11 East, 441; Harwood *v.* Wallis, 2 Ves. 195; Fonnereau *v.* Poyntz, 1 Bro. C. C. 477; Brown *v.* Selwin, For. 240; Stratton *v.* Best, 1 Ves. Jun. 285.

14. The Vice-Chancellor appears to have thought that the omission of the word "Gloucester" in the particular devise would avoid the whole will as to Gloucester, although in other passages in the will the estates were regularly devised according to the testator's intention, for although he held that he could not supply the word omitted, yet he said that the will executed with that omission was certainly not the will of the devisor, and so it must be found by a jury upon the facts stated as to the Gloucester estate. He added, that if any party asked the same he was ready to direct an issue to try whether this was the will of the testator as to the Gloucester estate, and upon this issue the evidence tendered would be admissible. This the heir-at-law declined, because upon the will as it stood, *primâ facie* the Gloucester estate was omitted in the devise to Lady Newburgh for life, with many remainders over, including limitations to unborn children in strict settlement, and it was not until failure of all these limitations that there was in express words a devise over of the Gloucester with the other estates, so that the devise over appeared to be too remote and therefore void. Of course Lady Newburgh sought no such issue, because she wanted an actual devise to her to support her claim. But the Vice-Chancellor in offering such an issue must have been of opinion that the omission of the word "Gloucester" in the particular devise would render the whole will void as to the Gloucester estate. This, of course, could not be maintained, because, although the will did not contain all that the testator intended as to this estate, it contained in the actual devises of it nothing but what he did intend. And in the result the omission was supplied by construction, and the will was supported just as if there had been no mistake (*f*).

(*f*) *Infra*, 1, 3, Div. IX.

15. In Lord Camoys *v.* Blundell (*g*), an important although a simple point was decided upon an inaccurate description of the devisee, and which in some measure involved the question of the admissibility of parol evidence. The testator gave his estates to trustees upon trust for "the second son of Edward Weld, of Lulworth, Esq., for life, and then for his sons in tail male, and for default of such issue in trust for the third and other sons (*except the eldest*) of the said Edward Weld in tail male in strict settlement, and for default of such issue in trust for the first and other sons of each brother (*except the eldest brother*) of the said Edward Weld in tail male in strict settlement, and for default of such issue upon trust for the sons (except the eldest) of Lady Stourton, *one of the sisters of the said Edward Weld,* in tail male in strict settlement, with other gifts over. These limitations are only important as far as they show whom the testator intended by the description of second son of Edward Weld, of Lulworth, for there was no person who correctly answered that description, inasmuch as there was no person whose name and description strictly answered the designation in the will. The person in possession of Lulworth Castle at the date of the will was *Joseph* Weld, who had three sons then living, and his second son (whose name was Thomas) claimed the estates. Joseph was the person who would properly be described as of Lulworth; he had an eldest brother, and Lady Stourton was his sister; so that if Joseph was on the manifest intention substituted for Edward, the whole devise would be strictly accurate; and there were directions in the will as to residence, taking the name and arms, &c., which tended to show that the testator treated the first devisee as a person *in esse.* Joseph, it should be observed, had had an elder brother named Edward, but who had died long before the date of the will, a bachelor. Joseph's eldest son was named Edward Joseph Weld, and in ordinary transactions

(*g*) Printed Cases, D. P. 1847, 1848; 11 Sim. 467; 1 Phil. 279, *nom.* Blundell *v.* Gladstone. See 14 Sim. 83.

he called himself Edward Weld: at the date of the will and the death of the testator he was a bachelor, but it was insisted that he himself was entitled as devisee. This claim was made on the ground that there was no issue of Edward Weld (who died long before the date of the will), and that the next trust was for the first and other sons of each brother (except the eldest brother) of the said Edward Weld, and Joseph Weld was the next brother of the deceased Edward Weld and the father of the claimant, Edward Joseph Weld. It was insisted that there was a member of the family whose name was Edward, who had an elder brother, and who was himself the brother of Lady Stourton, and consequently the description in the will applied to him in every particular. Edward Joseph Weld, who claimed for himself, could not, of course, argue in favour of the claim of a second son of his. Sir L. Shadwell, V. C., thought it plain from the evidence that the testator, at or about the time when he made his will, was told that Edward Weld, the uncle, died long before. On the part of the testator's heirs-at-law, it was insisted that Thomas, the plaintiff, the second son of Joseph, was not entitled: he advocated the claim of the son of Edward Joseph Weld manifestly with a view to render the whole devise void for uncertainty; for it was insisted that all the cases were consistent in deciding that if any part of the description equally applied to two persons, the Courts could not carry the testator's intention into effect: the difficulties in the way of this claim for the second son of Edward Joseph was, that the description as of Lulworth did not so properly belong to him as to his father; that he had no elder brother, and that Lady Stourton was not his sister but his aunt; that he was a bachelor when the will was made, and that to vest the estate in a second son of his as the person first entitled would defeat many of the limitations which the testator had introduced into his will. The Vice Chancellor held clearly that the mistake was simply in calling Joseph Weld by the

name of Edward Weld. He summed up by the observation, that he had on one side a sufficient designation for some purposes (but not a full and accurate one) of one person, with two circumstances attached to it, and describing him, but which by no means suited him [viz., Edward Joseph Weld], and on the other side he had a designation of a person which was inaccurate; but the two other circumstances so suited and pointed to that person, as not to leave in his mind the shadow of a doubt that he was the person whom the testator meant to describe. It must be borne in mind that this passage has reference to the claim set up *for the second son* of Edward Joseph Weld, and not to the claim maintained by him on his own behalf.

16. From this decision there was an appeal by the testator's heirs-at-law, and Lord Lyndhurst, C., called to his assistance Mr. Justice Patteson and Mr. Justice Maule, who delivered their opinion that the testator used the word "Edward" by mistake for "Joseph," and that Thomas, the plaintiff, was the person designated by the devise as the second son of Edward Weld, of Lulworth, in which view the Lord Chancellor concurred, and accordingly affirmed the decree. From this decree there was an appeal to the House of Lords, and the Judges having been summoned, Mr. Baron Parke delivered their unanimous opinion in favour of the decree. He observed that the devisee was not designated by name, but by description only, neither his Christian nor his surname was mentioned, but he was described by his relation only to other individuals. The case therefore was not the same as if it had been a devise to Edward Weld himself, upon which supposition a good deal of the argument at the bar had proceeded. It might be conceded that where a devisee was described by his Christian and surname, and some other distinctive circumstance, and no person answered both descriptions, and there was nothing in the rest of the will, or the admitted evidence, to show who was meant, the

name would prevail, and the descriptive circumstance be rejected. But the maxim, "*Veritas nominis tollit errorem demonstrationis*" was not inflexible, as had been explained by L. C. J. Gibbs, in Doe *v.* Hathwaite, 2 Moo. 323. For if it were clear, upon the due construction of the will, with reference to the evidence of the state of the family, as known to the testator, that the meaning of the testator, as expressed by the will, was that the person described, and not the person named, was to take, the description would prevail over the name; for the rule in question had no other object than to assist in discovering the meaning of the will, and was not applicable where it led to a construction contrary to the expressed meaning of the testator. Here, then, the question would be, supposing even this were a devise for a person by name, whether the context and the evidence of the state of the family did not cause the description to prevail over the designation by name? They thought the context, coupled with that evidence, clearly denoted that the name of Edward was a mistake. It might be admitted that the Christian name is not merely the name of baptism, but the name by which a person is commonly known, and that the evidence showed that Edward Joseph was commonly known by the name of Edward, so as properly to be described, and take by that name, if the devise had been to him. Nor was it worth while to argue whether the description, "of Lulworth," (though certainly more applicable in ordinary parlance to the possessor of the place) would not be applicable to him though he only resided in Lulworth, and was not the possessor of the castle. Admitting that it did, and that if there had been nothing more than a devise to Edward Weld, of Lulworth, Edward Joseph, the eldest son, would have taken, they were of opinion that the other parts of the will, coupled with the evidence of the state of the family, did clearly point out that the devisee was the second son of Joseph Weld, the possessor of Lulworth Castle. The learned

Judge then relied upon the grounds, already mentioned, upon which they came to this conclusion. The House of Lords proposed to affirm the decree, with costs, upon the motion of Lord Cottenham, C., and with the concurrence of Lord Lyndhurst and Lord Campbell. Lord Brougham had been engaged in the Judicial Committee of the Privy Council during the argument. Upon looking over the opinion of the Judges, and considering the will, he felt so much doubt that he proposed the case should be re-argued by one counsel on each side; but after a long delay, he concurred in the opinion delivered by the Judges, and in the affirmance of the decree (*h*), and so the decree passed.

17. Besides the usual parol evidence on the part of the plaintiff to show the state of the Weld family at the date of the will, there was parol evidence to prove that the testator, when he gave his solicitor instructions to prepare his will, called the possessor of Lulworth by the name of Edward Weld, and that he was but imperfectly acquainted with the Christian names of the members of the Weld family; that in the course of conversations, as well prior as subsequently to the date of his will, he repeatedly called the possessor of Lulworth by the name of Edward, and upon one occasion, although corrected, persisted in speaking of the possessor of Lulworth Castle as Edward; and that in 1836 or 1837, (after the date of the will) he told a witness that he had left his estates to the second son of Edward Weld, of Lulworth Castle, in life rent, and stated that he had never seen the second son, and did not know his Christian name (*i*). There were two prior wills, made in 1821 and 1827, the contents of which proved that the testator then knew how properly to describe the second son of Joseph Weld, of Lulworth; but neither of these wills was proved as an exhibit, on

(*h*) House of Lords, 27 July 1848.

(*i*) 11 Sim. 470; 1 Phill. 284, 285.

account of an objection upon a point of form (*k*). The Vice-Chancellor said that, for the purpose of determining the question, he should only advert to the evidence which had been properly given of the state of the Weld family, entirely rejecting from his consideration everything else *dehors* the will that could be at all said to bear upon what the testator's intention was. He concluded his judgment by observing that he decided the case upon the words of the will, coupled with that evidence only which had been given as to the state of the Weld family at the date of the will, *and which he thought was the only part of the evidence which ought to be received.* Upon an appeal before the Lord Chancellor, he, after having heard the case argued, intimated that, as the case involved a question relating to the admissibility of evidence which was of great importance to the administration of justice, not only in that court but in courts of law, and as it appeared from the previous argument before him that there was some conflict between the earlier and the later authorities upon the point, he was desirous of having the case re-argued, in the presence of two of the common law Judges. One of the grounds of the appeal was the not receiving as evidence the two former wills; this point, however, was not decided, but the two Judges referred to them as if proved, probably on the ground that if a case had been sent to a court of law they would have been stated (*l*). Mr. Justice Patteson, in delivering the judgment of himself and Mr. Justice Maule, observed that much evidence had been adduced on both sides to show the state of the family of Weld, and the names of the different members of it, at the time of making the will, and to prove how far the testator was acquainted with them, none of which evidence was objected to as inadmissible; it was indeed objected on the part of the defendants, that the evidence given by a witness, of his conversations with the

(*k*) 11 Sim. 489. (*l*) 1 Phill. 280.

testator, in 1836 and 1837, could not be used as proof of the intention of the testator, or as declarations made by him respecting the person who was the object of his devise. To this objection the counsel of the plaintiff acceded, and proposed not to use them for the purpose of such proof, but as evidence of the testator's ignorance of the name of the second son of Edward [Joseph] Weld, and for this purpose they were allowed by the counsel for the defendants to be, and no doubt were, admissible. The case therefore was free from any question as to admissibility of evidence. Mr. Baron Parke, in delivering the opinion of the Judges in the House of Lords, said it appeared to them, upon reading the will, and looking only at the evidence of the state of the Weld family at the time the testator made his will, and without adverting to the other parol evidence received in the Court of Chancery, *and, as they thought, rightly received,* that the meaning of the words was clear. At the conclusion of his observations the learned Judge said that they had to add that the other extrinsic evidence, on which they had not relied, did not, taken altogether, lead them in the least to doubt the propriety of the conclusion to which they had come from the will, and the extrinsic evidence to which they had referred as the ground of their opinion.

18. In the case of Hearle *v.* Hicks (*m*) it was decided that a clear life estate given by the will to the testator's wife in a portion of his real estate which was copyhold, was not revoked by a codicil by which he revoked "*several* of the dispositions in his will of all his freehold, copyhold, and personal estate and effects of all and every kind and descrip-

(*m*) 1 Cla. & Fin. 20; 6 Bligh, N. S. 37; 8 Bing. 475. See 1 Yo. & Jerv. 470; 5 Adol. & Ell. 38; 6 Sim. 391; 11 Sim. 536; and see Stokes *v.* Heron, 12 Cla. & Fin. 161, *infra*; Daly *v.* Daly, 2 Jo. & Lat. 752; Perse *v.* Daly, 9 Ir. Eq. Rep. 508. So in wills a clear gift will not be cut down by subsequent uncertain expressions. Thornhill *v.* Hall, 2 Cla. & Fin. 22; 8 Bligh, N. S. 88.

tion; and in the place of such devise, disposition, and bequest he devised and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatever and wheresoever situated," unto his daughter, and afterwards to his grandson. After great difference of opinion in the courts below, Tindal, C. J., delivered in the House of Lords the opinion of the Judges. He said that the general principle upon which their opinion proceeded might be stated thus: The testator does by his will show a clear and manifest intention to devise the estate in question to his wife for her widowhood. If such devise in the will is clear, it is incumbent on those who contend it is not to take effect, by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand. All the Judges agreed that the clause of revocation contained in the codicil did not apply to the devise in question with such clearness and certainty as to operate as a revocation of that plain and explicit devise contained in the will (I).

19. Nor will a codicil disposing of a subject devised by the will be held to disturb the devise in the will beyond what is necessary to give effect to the disposition in the codicil. In Duffield *v.* Duffield (*n*) the testator gave his

(*n*) 3 Bligh, N. S. 262, where the head-note refers by mistake to the estate not comprised in the residuary devise, and the contents of the will are not stated with sufficient fulness to enable the reader to understand all the questions put to the Judges; and see 1 Dow, 268, where the head-note is also wrong as to the intermediate rents of the estates devised by the codicil. See ib. 395.

(I) The facts are not sufficiently stated in the House of Lords' Reports. In Bligh's report the argument for the plaintiff in error abruptly closes, and is confounded, in p. 48, with the opinion of the Judges, as delivered by the Chief Justice. Although the complication of the facts renders it unadvisable to insert them in the text, yet the following analysis, extracted from my

residuary estate to trustees in fee upon trust to sell, and out of the money to discharge his debts, &c., and then upon certain trusts for his daughter and her children, with a gift over. The testator afterwards drew lines with a pen over the trust for sale. He then made a codicil, by which he

notes, may be useful to those who may have occasion to study the case. The testator had three estates: 1, a copyhold in Bucks; 2, a freehold in Cornwall; 3, a freehold in Bucks. His son died without issue, after the will, and before the date of the first codicil.

Will.— Plomer Hill House. (Copyhold.)	Treravel, Cornwall.	Bradenham, Bucks. (Freehold),
Trustees in fee for wife's residence during widowhood; remainder, trusts declared of the residue of his real estates.	To trustees; annuity to his niece, residue to his daughter, Mrs. Hearle, for life, for separate use; remainder, her children in tail; remainder to the uses declared of the residue of his real estates.	And general residue to trustees in fee; 300 *l.* per annum to wife for widowhood. [To son for life; remainder to his sons in tail male.] Remainder (100 *l.* a year more to widow, and an additional annuity to daughter.) John Graves, his grandson, for life; remainder, sons in tail male; remainder, Mrs. Hearle's sons in tail male; remainder, his own right heirs.
Existing uses of residue under Will. Annuity to wife, &c.; John Graves life, sons in tail; Mrs. Hearle's sons in tail; right heirs.	*Existing uses of residue under Will.* Annuity to wife, &c.; John Graves life, sons in tail; Mrs. Hearle's sons in tail; right heirs.	
	1*st Codicil.* — After Mrs. Hearle's death, to Francis, her husband, for life; remainder to uses limited by will after daughter's death.	1*st Codicil.*—Additional annuity to widow; additional annuity to daughter; an annuity to her husband; next presentation of living to Mountsteven.

4*th Codicil.*—Revokes several dispositions in will and codicils of all his freehold, copyhold, and personal estate, &c., and instead thereof gives all his freehold, copyhold, and personal estates, &c., to his daughter, Mrs. Hearle, for life; remainder to John Graves, his grandson, in strict entail as in his will directed; remainder as by his will directed; additional annuity to widow. Confirms annuities and donations in will and codicils. In all other respects confirms will and codicils.

	5*th Codicil.* — Treravel. — Mr. Hearle for life, subject to annuity for niece.	5*th Codicil.*—Bradenham.— Annuity to Mr. Hearle for life.

PERSONAL ESTATE.

Will.—Parliamentary stocks, &c., wife for widowhood. To person absolutely in possession of residuary real estate. Ready money, &c., to wife absolutely. Furniture, plate, &c., wife whilst entitled to house. To person absolutely in possession as before.	*Will.*—Residue; son absolutely.
1*st Codicil.*—Revoked the bequests of plate, furniture, &c., and gave her absolutely the furniture, &c., at Plomer Hill.	1*st Codicil.*—Wife absolutely.
	2*d Codicil.*—Wife executrix and residuary legatee.
	3*d Codicil.*—Fire-office shares wife, life; daughter and husband, lives and survivor. Heir in possession of Bradenham.
See above, the 4th Codicil.	5*th Codicil.*—Wife to have effects of her late father, &c.

declared that the sole intention of such erasure was to revoke that part only of the will whereby he directed the sale of his freehold property, which he accordingly revoked, and he directed that the son lawfully begotten of his daughter who should first attain 21, should on attaining that age change his name for that of Elwes, and he devised to the said son on his attaining 21 and changing his name, all his freehold property to hold to him, his heirs and assigns for ever. The Judges of the Court of King's Bench, upon a case sent to them, appear to have been of opinion that the revocation by the codicil was confined to the residuary estates, and did not affect devises in the will of particular estates, and that the devise to the son by the codicil did not wholly revoke the devise by the will of the legal estate to the trustees, and that they were entitled to the rents until a son became entitled. Sir John Leach differed from the Judges on the latter point, and held that the codicil operated as a total revocation of the devise of the residuary estates, including the devise to the trustees (*o*), so that the son would at once take the legal estate, as he held that the estate vested. Upon an appeal to the House of Lords, the Judges having been consulted were of opinion that the devise to the trustees in the will was not wholly revoked. The revocation of the direction to sell left the legal estate in fee as well as the beneficial trusts absolutely untouched. The executory devise in the codicil was a revocation *pro tanto* of the devise in the will: it was an indirect revocation. The last revoked the first, because they were inconsistent. It revoked, therefore, to the extent they were inconsistent. Until the estate vested under the codicil the estate continued in the trustees, where the will had placed it. Lord Eldon, C., concurred in this opinion, and the House of Lords acted upon it (*p*).

20. But where an intention can be collected to make

(*o*) Duffield *v.* Elwes, 2 Sim. & Stu. 544.

(*p*) 3 Bligh, 344–346; 1 Dow, 401–403.

a new disposition by a codicil giving a residue, it will operate against a disposition of the residue by the will, although there is no express revocation, and the gift in the codicil is of the residue not thereinbefore or by the will disposed of.

21. This was decided in the case of Lord Hardwicke *v.* Douglas (*q*), where the testator by his will in 1827 charged 12,000 *l.*, under a power, upon the family estates held by his brother, and gave that and his leasehold and all his personal estate, subject to his debts, &c., and to such legacies as he should give by any codicil, to trustees to sell and convert the same into money, and the produce was to be enjoyed by his wife for life, and after her death the whole to be transferred to Charles Eurwicke Douglas (wishing him to use the name of Eurwicke only), if he should attain 25 or marry with consent, with a contingent gift over to his nephew, Charles Philip Yorke, afterwards Earl of Hardwicke. In 1832, upon C. E. Douglas's marriage, the testator settled 10,000 *l.* stock upon him, and covenanted for the payment of 10,000 *l.* to the trustees of the settlement, after the decease of the testator and his wife, with a declaration that any advance or any bequest to him should go in satisfaction *pro tanto*. On the 1st May 1833, by a first codicil the testator confirmed the charge of 12,000 *l.*, and he directed that 5,000 *l.*, part of it, should after his wife's death go to the trustees in Douglas's settlement in part satisfaction of the 10,000 *l.*, and the remainder to be paid out of his general personal estate: 2,000 *l.* was to be paid to Mr. Douglas and another person upon certain trusts, and 5,000 *l.*, residue of the 12,000 *l.*, should not be raised in the event (which happened in the person of his nephew) of any son of his late brother being entitled to the estates charged therewith. On the next day the testator made a second codicil, which he commenced thus: "This is a codicil of specific and pecuniary legacies

(*q*) West, 555; 7 Cla. & Fin. 795. See Sunford *v.* Sanford, 1 De Gex & Sma. 67.

to be also added to my will": he added the name of C. E. Douglas, then Sir Charles Douglas, to those of his executors (I). He gave several legacies, and 100 *l.* to his nephew at his wife's death, and small annuities to several persons, and as they ceased they were to fall into and become part of his personal estate and its residue: and he gave several specific articles of value as heir-looms for the possessor of Wimpole of his name and blood, and to Sir Charles Douglas his swords and other arms, and his gold watch, &c., and 100 *l.* to be paid after his decease; and then "all the rest and residue of my property not hereinbefore (or *by my will* or any other codicil) disposed of I give and bequeath to my nephew, C. P. Yorke, and to Sir C. E. Douglas, their executors, administrators, and assigns, after the death of my wife, equally to be divided between them, and I leave it at the option of Sir Charles E. Douglas to continue or not the name of Eurwicke singly, or to bear it as at present without alteration." Lord Cottenham, when Master of the Rolls, held that Sir Charles Douglas, notwithstanding the gift in the second codicil, was entitled under the will to the whole of the residuary personal estate. Upon an appeal to the House of Lords whilst he was Chancellor he continued of the same opinion. He admitted the probable intention, but he relied upon the clear gift in the will not expressly revoked by the codicil and the unambiguous gift in the codicil of the residue not disposed of by the will; the result was that there were two residuary gifts, and there was no subject matter left for the last gift to operate upon. But in the House of Lords the decree was reversed, and the gift in the second codicil of the residue established upon the opinions of Lord Lyndhurst and Lord Brougham: they considered that the testator had his will before him when he made the codicils, which was proved by his declaration about the name: the difficulty upon the words "or by my will," they got over by construing the last gift as

(I) It is stated in 7 Cla. & Fin. 709, that it was the appellant's name.

of all the residue of his property over the particular legacies given in the will and codicils, which was a sensible construction and left something for the words to act upon: the other construction was not a sensible one, and left nothing whatsoever. This, we may observe, was the best construction, and was warranted by the manifest intention. There was some difficulty perhaps from the testator's declaration that his codicil was of specific and pecuniary legacies, but that could not strike out of the codicil an actual gift of the residue. Now it is observable that throughout the codicil the testator deals with the most important portions of his general gift in the will without any express revocation of that gift: for example (dedicating 2,000 *l.*, part of the 12,000 *l.*, to other purposes), he divides the 12,000 *l.* between Sir Charles Douglas and Lord Hardwicke, for each in effect took 5,000 *l.* of the remaining 10,000 *l.* The articles in their nature heir-looms are so declared to be, and then comes the clear residuary gift to Sir Charles Douglas and Lord Hardwicke, their executors, &c., equally, which was only following up the testamentary intention exhibited in the preceding gifts, and coupled with the new direction as to the name, which varied the direction contained in the general gift in the will—and all without any express revocation—showed a clear intention to make a new disposition of his general residue.

SECTION II.

OF DEVISES: WHAT WILL PASS BY PARTICULAR WORDS.

1. *Where "things" means things* ejusdem generis.
2. *Devise of an estate contracted to be sold, passing only legal estate.*
3. *An exception construed to be only an exclusion of a particular interest.*
4. *Affirmed in D. P.*
5. *Observations thereon.*
6. *Mortgage for stock to go to legatee of like stock.*
8. *Estate omitted in devise over descends to heir.*

1. THE word things in a gift following an enumeration of particular articles generally means things *ejusdem generis*. This question was settled in the case of Stuart *v.* Lord Bute (*a*). Lord Bute devised his estates and collieries to his wife for life, with remainder to his grandchildren. And he gave all his waggon ways, rails, staiths, and all implements, utensils, and things which at the time of his death should or might be used or employed, together, with, or in, or for the working, management, or employment of any of the said collieries, and of the nature of personal estate, to his executors upon trust to be held, used, and enjoyed with the collieries; and he made his son residuary legatee. The collieries were carried on in partnership. Lord Rosslyn referred it to the Master, to inquire which of the particular articles in dispute were necessary for carrying on the collieries, which reference was deemed erroneous by the House of Lords. Lord Rosslyn, in an ingenious judgment (*b*), held that money due from the fitters and others, and in the county bank, coals at the pit, and other articles passed; and Lord Eldon a few days before he resigned the Great Seal in 1806 (*c*), affirmed the decree with great hesi-

(*a*) 1 Dow, 73.
(*b*) 3 Ves. 212.
(*c*) 11 Ves. 657. See Wilee *v.* Wilee, 7 Bing. 664.

tation. Lord Rosslyn said he did not consider the money in this case at all as money, and it was not a fair way of considering it. It had not any of the qualities of money. It was not at the command of the party. It was not used as money. It yielded no interest. It was as much part of the machinery of the colliery as any of the engines used to procure the general result of profit of all the component parts, real and personal, that entered into the trade. It was therefore correctly stock in trade. He admitted that in general "things" may be very properly restrained to things *ejusdem generis*. In the House of Lords it was considered that the intention of the testator was to give those articles only which might be enjoyed with the colliery as long as they lasted, and that the enumeration ought not to be extended beyond the usual construction of the word "things," that is, things *ejusdem generis*. Horses, hay, corn, &c. were not properly by-gone profits, but to be used and employed in working the collieries, and therefore passed; but the coals raised, the debts due to the concern, and money in the bank, did not pass, as they were not in their nature within the meaning of the word *things* as used in the will, but rather by-gone profits. And the decree below was reversed to this extent upon the advice of Lord Redesdale, and with the concurrence of Lord Eldon, C. They held that the fund which did not pass was applicable in the first place to the payment of the debts of the collieries, as the partnership had a specific lien upon it for this purpose in preference to other creditors. The case was justly treated as one of considerable importance. If the decree below were to stand it might, it was said, be argued that if a man gave a manufactory, and things employed in it, it could not be carried on without goods and money, and thus all a man's goods and money, and the whole of his property, might pass, though it might be his intention to give only the manufactory with the things actually employed in it, which would be monstrous. Lord Rosslyn's determination no

doubt best effectuated the testator's intention, but the reversal was best calculated to keep the rule of construction steady (*d*).

2. In the case of Shephard *v.* Knollys (*e*), it was held that a devise of an estate, contracted to be sold, passed only the legal estate, and not the beneficial interest. Mr. Knollys was seised in fee of several estates, subject to mortgages, and he had contracted to sell one of them for upwards of 13,000 *l.*, but which contract was not completed in his life-time. By his will he gave to his dear wife his freehold estate, which he had lately contracted to sell to Sir Thomas Metcalfe, together with the lands, &c., thereunto belonging, to hold to her, her heirs, and assigns for ever. And he gave to his said dear wife all and singular his personal estate and effects, of whatever nature the same might be, subject to the payment of all his debts and funeral expenses, and to his legacies. The question was, whether this was a specific legacy to the wife of the purchase-money of the estate, or in other words, whether the wife took the beneficial interest in the estate, subject to the contract, which became material, with a view to the payment of mortgage debts. Lord Eldon held, that it was not a specific legacy, and that it was nothing more than a devise of the legal estate, to enable her to carry the contract into execution: he thought it a disposition of the legal, but not of the beneficial estate; and upon an appeal to the House of Lords that decision was affirmed, with 100 *l.* costs. I was of counsel for the respondent, but I never could reconcile my mind to the decision. The testator, by the very terms of the gift, meant a benefit to her whom he called his dear wife. No intention was manifested to make her a simple trustee: the words of the

(*d*) See Rawlings *v.* Jennings, 13 Ves. 39; Hotham *v.* Sutton, 15 Ves. 319; Hearne *v.* Wigginton, 6 Madd. 122; Fleming *v.* Burrows, 1 Russ. 280; Oldman *v.* Slater, 3 Sim. 94; Hastings *v.* Hare, 6 Sim. 67.

(*e*) Printed Cas. D. P. 1824; 1 Jac. & Walk. 499, cited. See 1 Vict. c. 26.

gift were ample to pass both the legal and beneficial interest, subject only to the contract which bound both, and which, if completed, would give to the widow an equivalent for the estate. If the contract had failed, the decision would have led to great difficulty. The subsequent gift of all the personal estate to his wife rather bears against the construction adopted, for as the testator intended her to have all his personalty, there was no reason why the right to the purchase-money should not pass by the gift of the estate itself. The testator showed no intention to charge this estate, or the produce of it, with his debts. And the other portions of the will, I may observe, tended to prove that he had no such intention. The decision, acting upon the rule of equity as to conversion of property by a contract for sale, put a technical construction upon the devise, not warranted by any rule, and not supported by the testator's intention. Lord Redesdale, who concurred with Lord Eldon in affirming the decision, said that at first he had thought it erroneous, and it was manifest that such was his impression during the argument.

3. In Gurly *v.* Gurly (*f*), where the testator had both a freehold and leasehold interest in an estate, an exception of his interest in it in a devise of his freeholds was construed to exclude only his leasehold interest, which he afterwards disposed of. This view was adopted, in order to effect the supposed intention of the testator. Mr. Bagnal demised to Mr. St. Leger the lands of Knockroe, in the county of Carlow, for three lives, at the rent of 100*l.* In 1768 St. Leger made a demise, which operated as an assignment to Mr. Gurly, for the same three lives (I). In 1784 Bagnal

(*f*) 2 Dru. & Wal. 463; 8 Cla. & Fin. 743.

(I) In Cla. & Fin. and in the Printed Cases it is said that the deed was lost, and was not registered, but an old memorial thereof found among the family papers of the Gurlys, and appearing to have been prepared for registration, was read by both parties at the hearing. In Ireland no question was raised as to the want of a conveyance. It is clear that a conveyance would have been presumed.

demised to Gurly the same property, for 999 years, from 4 November 1784 (I), at a peppercorn, during the continuance of the lease to St. Leger, and after its determination at 100*l.* a year. Gurly therefore had a freehold lease for lives, and a chattel lease for 999 years, to commence in interest upon the dropping of the lives, and he held both immediately of Bagnal. If, as suggested in one report, the assignment from St. Leger to Gurly was not executed, and the possession rested in contract, and a conveyance could not be presumed, yet in equity Gurly was owner of the estate, and held of Bagnal. But, of course, Gurly considered he had a good title, and no such point was raised in the court below. By his will, in 1797, when two lives were in existence, Gurly ordered all his debts and funeral expenses to be paid, and he ordered all his freehold interests in the counties of Carlow and Wexford, except his interest in Knockroe, which he held under B. Bagnal, to be sold, and the money arising from the sale to be divided between his two sons and five of his daughters. After various other dispositions he proceeded thus: When the lives of Messrs. St. Leger should expire, on which the present lease of Knockroe depended, he ordered that all his interest therein should be sold, and the money to arise from the sale, on its new setting, to be laid up, and to become an aggregate fund to pay his debts; but in case there should not be any debts remaining due by him at that time, the money arising from such sale should be amongst his residuary legatees, being four of his daughters and a granddaughter, the child of one of his sons. Lord Plunket, C., held that the direction as to his interest under Bagnal was merely an expression of his intention, as thereinafter clearly expressed, that his lease-

(I) This is the statement in Dru. & Walsh. In Cla. & Fin. it is stated that this reversionary lease was to commence *from the expiration of the lease for lives:* in the Printed Cases the deed is stated to bear date the 4th May 1784, and the *habendum* was for 999 years from the 1st May then instant.

hold interest in Knockroe should not be sold at the same time with the sale of his freehold interest in it, which he thereby leaves just as it stood under the devise, which directs that his freeholds in Carlow and Wexford should be sold, and which evidently meant an immediate sale. But even if this were not capable of receiving such a literal explanation he said he should not feel himself warranted on such a grammatical difficulty to overrule the clear express words by which the freeholds in Carlow and Wexford were directed to be sold.

4. In the House of Lords, Lord Lyndhurst, C., did not conceive that the testator, in the true acceptation of the term, held the freehold interest in Knockroe under Mr. Bagnal; therefore that freehold interest did not fall within the terms of the exception, but passed under the devise: this rendered the exception unnecessary; but the true interpretation was, I order all my freehold interests in Carlow and Wexford, including my freehold interest in Knockroe, but not including the interest which I hold under B. Bagnal, to be sold (I). Lord Brougham concurred. Lord Cottenham observed that if the testator intended to except the freehold he did not intend that the clause in which he disposes of his freehold interests in Carlow and Wexford should operate on the Knockroe estate at all. Under these circumstances it might have been expected that the exception would have been of his estate of Knockroe, that is, he would have given all his freehold estates in the counties of Carlow and Wexford, except the estate in Knockroe; but instead of that we find the exception to be of the interest which he had under B. Bagnal. Lord Campbell, who also concurred, said he should have hesitated very much if it had turned out that there had been a legal assignment of that freehold estate to Gurly; but it was admitted that there was no such legal assignment, but only an executory agreement. The decree was affirmed with costs.

(I) Compare this with the actual devise.

5. This decision, notwithstanding the great authority upon which it rests, is open to observation. It is a rule of interpretation not lightly to be departed from, that words in a will should receive their natural grammatical construction, to which legal effect should be given. A clear intention, to be collected from other parts of the instrument, may authorize a Judge to mould the words so as to effect that intention. Now, in the case before us, the above salutary rule was wholly disregarded, without the excuse which alone could justify such a departure. Gurly had a freehold interest in Knockroe, and he had a long chattel interest in the same estate, to commence in possession when the former interest ceased. When the testator devised his freehold *interests* in the two counties to be sold, he knew that without an exception, the devise would include Knockroe, he therefore excepted his interest in Knockroe, which he held under Bagnal. What can be plainer? He was disposing of freehold interests only, consequently it was not necessary to state that he excepted his *freehold* interest, for none other required to be excepted. The chattel interest would not have passed; although the exception had been wholly omitted, the freehold interest would. Lord Cottenham said the testator ought to have given his freehold estates in the counties, except his estate of Knockroe; but he said the exception is of the interest. No doubt it is; but the devise out of which the interest was excepted was also of the interests, and not of the estates. The devise is accurate, and the exception strictly what it should be, viz., of something out of the thing devised. But it was said by the Lord Chancellor that he did not hold the freehold of Bagnal; and one learned Lord would have doubted very much if there had been a legal transfer; but this appears to be a very weak point, for the reasons already stated. Where a man has contracted for an estate he may dispose of it just as if he had obtained a regular conveyance. If any doubt could be raised upon this head it was removed by the subject of the devise, viz., freehold interests; so that

when he excepted the interest which he held under Bagnal it could only refer to the freehold interest which, either legally, or, at all events, in a popular sense, he held under Bagnal: he had no other freehold interest in Knockroe. The subsequent direction shows clearly the testator's knowledge of the difference between "the present lease of Knockroe," and his interest "on its new setting," and that he considered himself as holding "the present lease," and not a mere contract for it. If even the word interest in the exception is to be read without the word freehold understood, yet it ought to be construed as an exception and exclusion of *all* the interest, both freehold and chattel, in the property. The direction to sell the chattel interest when the lives dropped was relied upon to show that that only was the interest which he intended to except. It would be difficult to point out how it affords such an inference. There is a total absence of all intention to dispose of the freehold interest. But if we advert to the object of the disposition of the chattels, we may ask, is it probable that the testator intended there should be *two* sales, at distinct times, of distinct interests in this one leasehold estate, held by him in effect for 999 years? Could he have intended the property to have been sold by the executors for the lives, and the money to go to the seven children, and then, after waiting till the lives dropped, the estate to be recovered by the executors, and sold for the 999 years term, and the money to be a fund for the payment of the debts, or to go to the four children and the grandchild? No such thing is expressed. He no doubt forgot to dispose of the freehold interest in Knockroe. If this had been pointed out to him, he probably would have directed the profits, till a sale of the chattel lease, to be added to the purchase money, or he might have supposed that it would go to pay his debts; for when the chattel interest was sold, the purchase money was to become a fund for debts then remaining due by him. Even in the disposition of that purchase money he only

gives it to the legatees in case there should not be any debts, although of course he intended, and the law would give effect to that intention, that any surplus after payment of debts should go to the legatees. The construction put upon this will did great violence to the terms in which it is expressed, whilst the natural and legal meaning of the words would have given effect to every intention of which the testator had afforded any indication. The principle of the decision requires further consideration before it should be followed.

6. In a later case (*g*), three per cent. stock secured by a mortgage made prior to a will was held to pass by a bequest by the mortgagee of like stock, to be deemed a legacy of quantity, and to be due at his death as if the same were a specific legacy, with a provision for raising the deficiency out of real estate in case the testator should not die possessed of stock sufficient to answer the legacy, or, according to another passage in the will, in case he should not have at his death sufficient of that stock. This was first decided by the Vice Chancellor, then upon appeal by the Lord Chancellor, and finally by the House of Lords. This, though a liberal, was a proper construction. For the appellant it was insisted that the testator had only disposed of the stock of which he was possessed at his death; that of this stock he was not possessed, it was only transferable on request, and none had been made, and the only remedies of the testator were a foreclosure suit or an action on the covenant. And it was forcibly argued that the word possessed, in its primary and natural signification, meant stock in his own name, or in the name of a trustee, and the Court was not at liberty to give to the word another signification by means of an inquiry into extrinsic circumstances. This alluded to the Vice Chancellor's order, which directed an inquiry into the circumstances of the testator's property at the time his will

(*g*) Collison *v.* Curling, 9 Cla. & Fin. 88, *nom.* Collison *v.* Girling, 4 Myl. & Cra. 63.

was made, and at the time of his death; but this does not appear to be open to objection, and the decision gave effect to the testator's intention without doing any violence to the words.

7. We have already seen the confined construction which a devise of "my estate of Ashton," or of "my estate at Ashton," receives, and that parol evidence is inadmissible to enlarge the operation of the words (*h*), but that an estate may pass by name, and comprehend what would not pass if the description were a description by place (*i*), and that in such a case it may be shown by parol evidence what is parcel or not parcel.

8. Where in a devise over, after for example a life estate, one of the estates first devised is omitted, the estate omitted must descend to the heir-at-law. In the case of Gregg *v.* Mahon (*k*), under a will the testator was seised of the remainder in fee expectant upon the death of his nephew, Hugh, without issue male, of the castle, town, and lands of Inch, and of the town and lands of Nuaffe East, and he was seised of the remainder for lives under leases renewable for ever, expectant in like manner, of the town and lands of Inchbeg, and of the town and lands of Lissard, and he had also an estate in possession, held for lives, called Cappagh. By his will he devised and bequeathed to Ambrose Eccles and his heirs for ever all his estate, real, personal, and mixed, together with all his freehold interests, goods, chattels, and household furniture, in trust to permit his wife during her widowhood to take the issues and profits of the lands of Cappagh for her maintenance, together with the use of all stock, fixtures, and other articles in the dwelling-house and on the said lands of Cappagh as then remained there, but that as soon as she should die or marry, his interest in Cappagh, *together with everything thereby vested* in Ambrose Eccles, should by him be conveyed to the testator's youngest

(*h*) *Supra*, p. 201. (*i*) *Supra*, p. 202.

(*k*) Printed Cases, D. P. 1821.

son Richard, his heirs and assigns for ever; and after reciting that he was entitled to the reversion and inheritance in fee of the lands of Inch and Nuaffe East in the county of Clare, as also to the reversions of two leases for lives, with covenants for perpetual renewal, of Inchbeg and Lissard in the said county, under the will, provided Hugh died without issue male, and also further entitled thereto under articles made previous to the marriage of Hugh with his present wife, to which articles he was an executing party—he devised his said reversion and remainder of the said estate in fee in the said lands severally, together with his reversion and remainder in the said leases for lives renewable, and all his interest, either at law or in equity, in or to the said estate and leases severally unto Ambrose Eccles and his heirs for ever, in trust that if the contingency should happen in the life of his wife, then she should receive during her life out of the whole of the said lands 50*l.* a year quarterly, in addition to what was already provided for her by his will; but if the said contingency should not happen in her lifetime, but should happen after her death, then the trustee or his heirs, whenever the contingency should happen, should hold the said lands severally charged with 300*l.* to each of the testator's children, Jonathan, William, and Mary, for their sole and separate uses; and so soon as the said sum of 300*l.* each should be paid or otherwise contented, then to convey the said *several* lands of Inch, both estate and freehold interests, unto the testator's son Richard, his heirs and assigns for ever; and he appointed his wife and Richard his executors. Richard, the youngest son, claimed all the lands, and entered upon them, and left Richard his eldest son. The lands of Inch and Nuaffe East were separate and distinct denominations, and paid quit rent and country taxes accordingly. Eccles conveyed to the persons entitled (I). It was held, first, in the King's Bench in Ireland, secondly, in the Court of

(I) This was so stated in the special verdict; by agreement, I suppose, so as to raise the question at law.

Exchequer Chamber there, and thirdly, in the House of Lords, that there being no disposition of the town, lands, &c. of Nuaffe East, Eccles was a trustee of them for the testator's heir-at-law, Jonathan. Richard contended that upon the fair construction of the will, Nuaffe East, as well as the other estates and interests, were vested in Eccles, in trust for Richard, charged with 900*l.* He relied upon the words "hereby vested," in the first devise, which referred to the entire will; and that as the testator when he made his will was not in possession of any real estate whatsoever (I), by the words "all my estate, real, personal, and mixed," he alluded to his reversionary estate in Inch and Nuaffe East thereinafter mentioned; that if he had intended Jonathan, who was his heir, to take Nuaffe East, it would have been absurd to charge it with 300*l.* for him; and lastly that the direction to convey the said several lands of Inch, both estate and freehold, unto Richard in fee, evidently referred to the whole of the property by the immediately preceding devise vested in Eccles, and that the omission of Nuaffe East was attributable to hurry or to the testator's opinion that he had already vested that property in Eccles by the first devise to him. On the other hand, for Jonathan, the heir-at-law, it was insisted that in the first place the testator, although he set out with a disposition of all his property, yet only disposed of the beneficial interest in Cappagh and the things in and about it; he only gave to Richard what he had before given to the widow, and therefore he postponed the enjoyment until after his death. The second devise proved that the reversion in question did not pass by the first devise. The direction to convey the lands of Inch would not authorize a conveyance of the lands of Nuaffe East (II).

(I) This is so stated in the appellant's reasons. It means that he had no estate in fee in possession.

(II) These reasons are signed by Sir Samuel Romilly and the writer, but I do not remember arguing the case.

SECTION III.

OF DEVISES: WHAT INTEREST WILL PASS BY PARTICULAR WORDS.

I. *Where the fee or perpetual interest passes:*

1. *Where the fee passes by appointing trustees of inheritance.*
2. *Stokes* v. *Heron: perpetual annuity.*
3. *Difference of opinion as to Wild's case applying to personalty.*
4, 5. *Opinions thereon in Dom. Proc.*
6. *The authorities considered.*
7. *Buffar* v. *Bradford.*
8. *Perpetuity not cut down by uncertain words in codicil.*
9. *The grounds considered.*
10. *Clear gift not cut down by ambiguous gift over.*

II. *An estate tail:*

1. *Jesson* v. *Wright, heirs of the body, not cut down by doubtful words.*
2. *Particular and general intent.*
3. *Rule restored by Jesson and Wright.*
4. *Doe* v. *Goff considered.*
5. *Fetherston* v. *Fetherston following Jesson and Wright.*
6. *Herries* v. *Jenkins: question not decided upon exception to Master's Report of good title.*
7. *Murthwaite* v. *Jenkinson—life estate in personalty although estate tail in realty.*
9. *Decision confined to the life estates.*

III. *Import of "first male lineal descendant" and "first male heir" of a branch of a family, and of "issue in tail male:"*

1. *Thellusson* v. *Woodford: "first male lineal descendant" excludes males claiming through females.*
2. *Doe* v. *Perratt, first male heir of the branch of my uncle Richard's family.*
3. *Points of law agreed upon.*
4. *Controversy between Matthew Perratt and Thomas Viney: heir apparent.*
5. *Meaning of the words "first male heir," &c.*
6. *When the remainder vested.*
7. *Trevor* v. *Trevor: under devise to "issue in tail male" in strict settlement: daughters as well as sons take estates in common in tail male with cross remainders in tail male.*

IV. *Of cross remainders:*

1. *Clayton* v. *Roe: cross remainders by implication.*

V. *Where estates are vested or contingent:*

1. *Bromfield* v. *Crowder: gift in remainder to the devisee, if he attain 21, if not over, vested.*
2. *Randall* v. *Doe: the like to issue as a class.*
3. *Doe* v. *Moore: the like, although the devise was immediate.*
4. *Phipps* v. *Williams: the like, affirmed in Phipps* v. *Ackers.*
5. *The opinion of the Judges considered.*
6. *Ackers* v. *Phipps: a direction to a devisee to give security not a condition: whether estate vested.*
7, 8. *Potts* v. *Potts: on words of contingency, chattels vested absolutely in tenant in tail in possession only.*
9. *Gift after life estate to surviving children.*

VI. *Of executory devises and shifting uses:*

1. *Executory devise to one of a class: vesting and divesting not allowed without special provision.*
2. *Duffield* v. *Duffield contra, before Vice Chancellor.*
3. *Observations on the decision: appeal reversing the decree.*
4. *Shifting uses: "younger son or daughter," how construed.*
5. *Scarisbrick* v. *Eccleston stated: decree reversed.*
6, 7. *Bootle* v. *Scarisbrick: the decree of the Vice Chancellor of the duchy on the Eccleston shifting clause reversed.*
8. *Trevor* v. *Trevor: shifting clause requiring some other person to be* in esse.
9. *Bedfordshire estate devised with short reference to previous clause: held to have the same construction.*
10. *Twenty-one years after lives in being allowed as a term in gross: Cadell* v. *Palmer, decree affirmed.*
11. *The devise in Cadell* v. *Palmer discussed: successive life estates to unborn issue, &c., limited to an estate for lives and 20 years afterwards: scheme to evade law against perpetuities.*
12. *The argument before the Vice Chancellor.*
13. *The observations of the Real Property Commissioners.*
14. *The argument in D. P.*

VII. *Of void devises, as too remote:*

1. *Accumulation void beyond the limit, although not expressly directed.*
2. *Tregonwell* v. *Sydenham: life estates in succession to persons born and unborn good* pro tanto.
3. *Judgment explained.*
4. *Tollemache* v. *Lord Coventry: chattels to go along with a barony: first taker has the absolute interest.*
5. *The extent of the judgment considered.*
6. *Observations on the judgment.*
7. *Lord Dungannon* v. *Smith, gift in general clause to one person who may be without the limit altogether void.*
8. *Examination of authorities relied upon in Ireland.*
9. *Boughton* v. *Boughton: devise to sons attaining 25 (including unborn ones) for life, and then to children, void as too remote.*
10. *Devise of reversion (expectant upon a limited failure of issue) in default of issue, void.*
11. *Bankes* v. *Holme accordingly.*
12. *Candy* v. *Campbell: gift of legacy with gift over, if legatee die without issue, void as to the latter.*
13. *No gift over valid after absolute gift of personal estate not cut down.*
14. *Loftus* v. *Smyth, gift of additional portions to daughters confined to failure of issue male at death.*

VIII. *Of intermediate rents and interest, and of resulting trusts:*

1. *Duffield* v. *Elwes: executory devise, intermediate rents pass under residuary devise.*
2. *Under strict settlement, remainder in fee not entitled before his remainder falls into possession.*
4. *Heir not entitled where residuary real and personal estate are one fund.*
5. *Tregonwell* v. *Sydenham: heir may be entitled to a charge against the devisee of the estate although person intended cannot take the charge.*
6. *But lapsed legacy falls into the estate.*
7. *Where the real estate is a fund only in aid of the personalty, the heir takes as a resulting trust.*
8. *Contrà where particular debt, not testator's own, is provided for out of real estate.*
9. *Specific legatee of estate entitled to have testator's mortgage paid off out of personalty.*
10. *Principal and interest to be laid out in land and settled, party entitled to interest after* 12 *months from testator's death.*

IX. *Of estates by construction or implication:*

2. *Newburgh* v. *Newburgh: estate for life implied in one estate, although expressly limited in another, upon the context.*
3. *Langston* v. *Pole: estate tail passed to first son under limitation to the second, third, and fourth, and other sons, according to seniority, upon the intention.*

X. *Of gifts to parent and children; where the latter take* per stirpes *or* per capita:

1. *Under gift to three children, and their younger children: parents and younger children living at testator's death took equally* per capita.
2. *Reversed: each child took a third for life, remainder to all his younger children* per stirpes.

I. We are to consider the cases where the fee has been held to pass.

1. WHERE a testator, after giving to his wife an additional jointure, his just debts being previously paid, and to his younger children legacies, appointed three persons "as trustees of inheritance for the execution thereof," it was held by the Court of Common Pleas (*a*) that no interest in or power over the testator's will passed to the persons named. In the King's Bench (*b*) three Judges against one held that the fee of the estates passed. The testator plainly meant to make them trustees of his estates of

(*a*) Trent *v.* Hanning, 1 New Rep. 116. (*b*) 7 East, 97.

inheritance in the same manner as if he had used the words "trustees of my inheritance," or "trustees to inherit my estates for the execution of my will." This view was adopted by Lord Eldon (*c*), and his decree was affirmed in the House of Lords with the concurrence of Lord Redesdale (*d*).

2. In the case of Stokes *v.* Heron (*e*) the testator directed that whatever he died possessed of or any way entitled to should produce to his wife an annuity of 100 *l.* per annum; to each of his daughters 100 *l.* per annum for themselves and their children; to his wife's mother, in addition to any property she might possess, so as to make up during her life an annuity of 100 *l.* per annum; said annuities after the decease of his wife and her mother to be equally divided between his three children, William, Mary, and Julia Louisa, but his intention was that his wife and her mother should enjoy their annuities for their lives and the life of the survivor of them, so that the survivor of them should possess an annuity of 200 *l.* per annum, to be after the decease of both equally divided between his three children: all the rest and residue of his property or possessions he gave to his son William. Julia Louisa had no child at the date of the will, or the death of the testator. Lord Plunket, C., held that all the annuities to the daughters were perpetuities upon the doctrine in Wild's case. Sir Edward Sugden, C., upon a rehearing was of the same opinion upon a different ground, viz., that this was a gift of property producing the amount of the annuity; and in the House of Lords it was also held that the annuities were perpetual.

3. But a controversy arose about the applicability of Wild's case, in 6 Rep. 17, to the bequest. In that case the devise was in remainder to R. Wild and his wife, and after their decease to their children, they then having issue,

(*c*) 10 Ves. 495.
(*d*) Trent *v.* Trent, 1 Dow, 102.
(*e*) 12 Cla. & Fin. 161; 3 Ir. Eq. Rep. 163; 2 Dru. & War. 89.

and all the Judges held that Wild and his wife had but an estate for life, with remainder to their children for life, although according to Moore's Rep. 379, the opinions of the Judges were divided. Coke says this was resolved for good law, that if A. deviseth his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail, for the intent is manifest that the children or issues should take, and as immediate devisees they cannot, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift was immediate, therefore there such words should be taken as words of limitation. But if a man devises land to A. and to his children or issue, and they then have issue, they shall have but a joint estate for life. Moore in his Report takes notice of no such resolution, but the decision and resolution are perfectly distinct in Coke's Reports. Lord Plunket, C., in support of his opinion in favour of the annuities being perpetual, observed that for this construction *Wild's case* appeared to him to be a direct authority, and the facts of the case and the terms of the will were almost identical. Here, he added, *as in that case*, the bequest to the daughter and her children is immediate and not by way of remainder, and the daughter had no child at the date of the will. It was said that the subject of the devise in Wild's case was real estate, and that in this will there was merely a bequest of personal estate, but it did not appear to him that there was any validity in that distinction. Sir Edward Sugden, C., upon a rehearing, observed that he should have felt a strong disinclination to apply the rule in Wild's case without necessity to personal estate. In later times, in the case of Knight *v.* Ellis, 2 Bro. C. C., 170, an example had been set of a similar disinclination. At the same time he fully agreed with the rule that any words which would necessarily create an estate tail in a devise of real estate must be held to create a *quasi* estate tail in a bequest

of personal estate, and therefore to pass the absolute interest, but this case did not fall within that rule. There seemed, he added, from what appeared in the judgment of this case, to have been some misapprehension in respect to Wild's case. Lord Plunket appeared to have considered the cases perfectly analogous, while there really was a great distinction between them. Here the gift was for them and their children all in one sentence, but in Wild's case the gift was to one and his wife, and after their decease to their children. This case, therefore, was not within the authority of Wild's case, properly speaking.

4. In the House of Lords Lord Brougham (I), after showing that the two Judges in the court below came to the same conclusion, although on different grounds, said he thought it right to state, that having much considered this question, and looked into the grounds of Lord Chancellor Sugden's refusal to extend the rule in Wild's case to personalty, he had not been able to follow him in that opinion. He could not find from first to last, in Lord Thurlow's judgment, either in the thing decided, or in the language used in deciding it, anything betokening a disinclination to apply the rule in Wild's case to personalty; on the contrary, Wild's case was never actually referred to in Knight *v.* Ellis; it was not mentioned, nor was any reference made to the rule. As to the reference to Wild's case, the mistake was Lord Chancellor Sugden's and not Lord Chancellor Plunket's. The *rule* in Wild's case shows that Lord Plunket was perfectly accurate. Sir Edward Sugden thought that the resolution respecting unborn issue was with respect to a gift to one and his wife, and after their decease to their children. It was no such thing, and to prove that statement the learned Lord read Wild's case to the House. Lord Plunket, he added, not confining himself to the margin, went to the words of Lord Coke himself. Therefore it was quite clear

(I) Lord Lyndhurst, C., does not seem to have taken any part in the decision of this case.

that Lord Plunket was perfectly right, and that Sir Edward Sugden thought him wrong, probably, by looking to the margin instead of the case. In another passage Lord Brougham, referring to a case in Bendlow, said the devise there was, "not after their decease, as Sir Edward Sugden supposed Wild's case to be." The learned Lord then endeavoured to show that Wild's case did apply to personalty. The mere question, which of the two Judges confounded the rule in Wild's case with the decision, or whether one of them relied on the marginal note only, and the other read the case itself, is hardly suited to the gravity of these pages, but, judging only from what appears in the reports of the case in Ireland, I may observe that Lord Plunket's successor considered that he (Lord P.) had relied upon the case, that is the decision, and not the rule in it, and the object was not to prove that he had fallen into an error, but to show that Wild's case was distinguishable from that under consideration. Such cases as Wild's case, and Knight and Ellis, are constantly under the eye of real property and chancery lawyers (I). Sir Edward Sugden does not appear to have made any such mistake as is imputed to him as to the resolution in Wild's case. He referred accurately to the point decided, and certainly did not confound the resolution with the decision, as appears to have been done by the noble Lord who commented on his observations in the House of Lords, when he said that the case in Bendlow was not *after their decease*, as Sir E. Sugden supposed Wild's case to be, for this, as we have seen, really is Wild's case. As to Knight and Ellis, the reference to it was manifestly intended simply to express in a few words the tendency of the decision.

5. To return to the point of law, Lord Cottenham refrained from giving any opinion on it, and Lord Campbell contented himself with observing, that he did not consider

(I) The only edition I ever possessed of the Reports is that of 1727, in which there are no marginal notes.

himself bound by Lord Chancellor Sugden's doctrine on this subject. As the case of Heron *v.* Stokes was decided in the House of Lords upon another ground, and Lord Plunket's reliance upon Wild's case was not supported on the rehearing, or on the appeal, it remains to consider the authorities for applying the rule in Wild's case to personalty. It is believed that Lord Plunket is the only Judge who ever so applied it. The rule itself, even as to real estate, has not been strictly adhered to (*f*), and it has been held that, although there is no child living at the time of the devise (which is required by the rule), yet a child born afterwards in the lifetime of the testator may take (*g*). Lord Brougham, in support of Lord Plunket's view and of his own, quoted several cases, but none of them appears to have any real bearing on the question, except the case of Buffar *v.* Bradford, which is always referred to on this subject. Lord Brougham told the House that, for instance, in *ex parte* Williams, 1 Jac. & Walk. 89, no distinction was taken between real and personal estate as to the application of Wild's case. So, he said, in Royle *v.* Hamilton, 4 Ves. 437, no distinction was taken. He also referred to Crone *v.* Odell, 1 Ball & Beat. 449, which we shall consider elsewhere, where Chief Justice Downes referred to Wild's case, and drew no distinction between realty and personalty, and to Doe *v.* Bradley, 16 East, 399, where he said the decision was in accordance with the rule, although the case which was referred to in the argument was not referred to in the judgment of the Court (I).

6. Now *ex parte* Williams was a devise of realty and personalty to the testator's wife for life, to be by her divided

(*f*) See Doe *v.* Elvey, 4 East, 313, particularly the judgment of Le Blanc, J.

(*g*) Buffar *v.* Bradford, 2 Atk. 220.

(I) Lord Brougham also referred to Blewitt *v.* Roberts, as if it had been supposed to have some bearing on the rule in Wild's case, 12 Cla. & Fin. 184, 185, but of course no such opinion was entertained or expressed.

according to her discretion, amongst such of his children and their issue as should be surviving at her decease. Wild's case was not referred to, and the case was decided upon a different principle: it was held that the words "children and their issue" were not to be construed as a limitation directing an estate to be conveyed to the children and their issue, but were descriptive of the objects of the testator's bounty: they were enumerated as the persons amongst whom the widow was to dispose of the estate. In Royle *v.* Hamilton the Court, without referring to any authority, put the best construction which it could do upon a blind clause, holding that when the testator spoke of the children of *A*, explaining that afterwards to mean them and their issue, he meant that if any of them should be dead their children were *personæ designatæ* to stand in their place. In Crone *v.* Odell, the Chief Justice referred to Wild's case, but there was nothing in the circumstances of that case to require a decision or an opinion that the doctrine in it applied to personalty. In the case of Doe *v.* Bradley the Court did not refer to Wild's case; and under a gift of a leasehold estate to the testator's daughter's children, to be equally divided between them, share and share alike, *and to the survivor of them*, and their children, it was held that the words "and their children" operated as words of limitation, although there were children of one of the daughter's children born in the testator's lifetime, and probably some of them before his will; which decision is not supported by the rule in Wild's case; and was pronounced on a different ground, and is itself open to much doubt.

7. The only direct authority on this question is Buffar *v.* Bradford (*h*). The testator there gave all his realty and personalty to his sister for her widowhood, so as the same

(*h*) 2 Atk. 220.

should be divided on her marriage, four-eighths as there provided for, and the remaining four parts to his niece Buffar and the children born of her body. After directing a valuation of the estates, he added that if any part should be thought too highly valued, that then such part should, when the time of possession came, go to Mrs. Buffar and her children, because they would then have four of the eight parts. Mrs. Buffar had no child when the will was made, but she had a child born afterwards, before the death of the testator, who survived him, but she herself died in the testator's lifetime. Lord Hardwicke said that it was insisted that it was a lapsed devise, and that Wild's case was relied upon. On the other hand, he said it must be allowed that children in their natural import are words of purchase and not of limitation, unless it is to comply with the intention of a testator. *It had been admitted very candidly by the counsel that as to the personal estate the children, though born after the making of the will, must take equally with the mother as joint-tenants, for where a man gives personal estate to A and her children, to construe the word children to be a word of limitation and not of purchase, would be a restrained and remote construction, and would defeat the children entirely, and the first taker would take all.* It is, he added, the time of possession in the present case which takes it out of the reasoning in Wild's case, for here Mrs. Buffar and her children are to have four-eighths, and are to take at the same time as joint-tenants: the child was held entitled to the four-eighths of all the property. Lord Plunket, in deciding Heron *v.* Stokes, considered Buffar *v.* Bradford as acknowledging the authority of Wild's case as equally applicable to the case of a chattel as of real estate. The decision there, he said, rested on the circumstance that at the time the interest vested in the daughter she had a child born, and it was held that the mother took jointly with the child, and he referred to the *concluding* passage in Lord Hardwicke's

judgment; so that here was a clear admission that the doctrine in Wild's case applies to personal as well as to real estate (*i*). Lord Brougham in supporting this view relied upon the same passage (*k*). But those learned persons do not appear to have kept in view the passage of the judgment printed above in italics. Lord Hardwicke first shows the natural import of the word children, he then states that the counsel admitted very candidly that as to the *personal estate* under such a gift the children would take equally with the mother; and the reason is, that difference between real and personal estate, which is enlarged upon by Lord Thurlow in Knight *v.* Ellis (*l*), and the judgment of Lord Hardwicke, as far as we have quoted it, concludes with the passage relied upon, which was not to show that Wild's case applied to personalty, but to prove why Wild's case did not in the case before him apply even to the realty. It is still confidently submitted that Lord Hardwicke's opinion was against the applicability of the rule in Wild's case to personal estate; and that appears to be the leaning of the Courts. It has even been held that under a gift to *A* and to her heirs (say children) of a legacy, the mother was entitled for life, with remainder to her children. The word heirs, it was said, which was used as synonymous with children, importing that they were to take after her death (*m*). It is a misapprehension to suppose that the word children is to be struck out of the will if the rule in Wild's case is not applied (*n*); the question simply is, whether the children may not themselves take as purchasers.

8. It remains to state the second important point—one of construction—decided in the House of Lords. We have

(*i*) 4 Ir. Eq. Rep. 168.

(*k*) 12 Cla. & Fin. 183, 184.

(*l*) 2 Bro. C. C. 578; and see 2 Dru. & War. 101, 107. In line 5 of p. 107 from the top, the word *the* should be read *where*.

(*m*) Crauford *v.* Trotter, 4 Madd. 361. See and consider Scott *v.* Scott, 15 Sim. 47.

(*n*) See 12 Cla. & Fin. 198, 199.

already seen that the will provided an annuity of 100*l.* for each of the two daughters, Mary and Julia Louisa, and her children, and that an annuity of 100*l.* per annum was provided for the testator's wife for life, and another for her mother for life, with survivorship between them; and after the decease of both, the 200*l.* per annum was to be equally divided between his three children, and the residue of his property was given to his son William. Mary having died without having been married, the testator made a codicil, in which, referring to her death, he stated that it became necessary to alter the disposition of his property, so far as related to her; he therefore directed that the 100*l.* per annum, &c. (I), provided for Mary should be divided between his daughter Julia Louisa and his son William; and that his will should remain in all other respects unaltered. Five years afterwards his wife's mother died, and seven years after her death the testator made a second codicil, upon which the question arose. It ran thus: "And in case my son William shall die without having issue male, my will is, that after the decease of my wife Mary and my daughter Julia Louisa, my remaining property shall then be equally divided between my sister and any daughters by her present husband she may have then living, and my sister-in-law and any children she may have by my late brother then living, share and share alike." In a few days afterwards he made a third codicil: "If under any circumstances the whole of the property I leave should fail to produce to my son William an annuity equivalent to that bequeathed to his daughter, viz. 150*l.* a year, I direct that the actual income, whatever that may be," should be divided in certain parts between his wife, daughter and son; and this arrangement to continue until the income should afford

(I) This &c. was held both below and in the House of Lords to include her reversionary share of the other annuities.

annuities of 200*l.* to his wife, 150*l.* a year to his daughter, and at least 150*l.* a year to his son (I).

Lord Plunket was of opinion, as we have seen, that Wild's case applied to all the annuities; and no question was raised as to the perpetuity to the daughter being cut down by the second codicil to a life interest. Upon the re-hearing, the then Chancellor observed that he was much struck by the words, not observed upon at the bar, in the second codicil, "after the decease of my wife and my daughter," which certainly looked as if he intended to give only life interests. On a subsequent day he said he found it impossible to get over the difficulty. The wife was expressly tenant for life: there were no words of perpetuity added to the gift to the daughter; and the expressions in the codicil imported that she was to have only a life interest. He had struggled with the words without success. As this point had not been argued, he offered to hear the case re-argued; but this was declined, and the appeal was lodged. In the House of Lords a new point was raised, viz. that the residuary property given by the second codicil, was the same residue as was given by the will, that is, the residue, after applying sufficient to answer the perpetual annuities. Lord Brougham and Lord Cottenham relied upon the second codicil, beginning with the word, "And," &c. The Chancellor of Ireland, the former learned Lord observed, considered remaining property to include, not merely the property given to William (II), for whose death without issue male he was providing, but all that he had before given in his will to the other children, beyond their life interests. "Can it," he asked, "be more clear than that, having given a residue to

(I) Lord Plunket observed that the third codicil referred to the annuity of 150*l.* given to the daughter, *and to that given to her upon the deaths of the wife and mother-in-law as parts of the same subject*, 3 Ir. Eq. Rep. 168. The 200*l.* a year to the wife is referred to, but not in the manner stated.

(II) In p. 189 Lord Brougham is made to say that the Chancellor construed the words to mean all that I have given except *what I have given William*. This is probably an error of the reporter.

William, when he is providing for the event of William's decease, he disposes of that residue by the not inappropriate words, 'remaining property.'" The third codicil, he thought, made it quite clear that the testator meant not to cut down what he had given but to increase it. He thought the gift over, on William's death without issue male, irrational, but to carry that irrational provision further, and to add the absurdity of cutting down the perpetuity to a life interest, on account of those words in the codicil, was a course utterly impossible for their Lordships to pursue. Lord Cottenham thought it clear that the testator was only dealing with that part of his property which, on the death of William, would be to be disposed of. He thought it perfectly plain what the testator meant. Lord Campbell concurred; but he said that if the second codicil disposed of the property which the will gave to the daughters, he thought a powerful argument might be deduced from it, as it directed that if his son should die without leaving issue male, on the death of his wife and daughter his "remaining property" should be divided amongst certain collateral relations. The words, "after the decease of my wife and daughter," he added, only indicate the time at which the gift to the collateral relations was to take effect, and not what was meant to be given to them. He should rather deprecate the application of any technical rule to the construction of a will of personalty.

9. I cannot help expressing a hope that the House of Lords, whilst it endeavours to effect the intention of testators, whether the property be real or personal, will not remove land-marks and refuse to apply settled rules of construction to a will of personalty. In the case under consideration, the difficulties in the way of the construction adopted were not grappled with, nor indeed, except partially by Lord Campbell, even alluded to. The circumstance that the second codicil began with "*And* in case," &c., was relied upon to show that no revocation as to the daughter was intended. Now by the

will William took his remaining third in the 200 *l.* a year, and the immediate interest in the residue absolutely. By the first codicil a further benefit was provided for him and his sister, and the rest of the will was confirmed. Then the second codicil, although beginning with "And in case," &c., yet proceeds to give over at least the residue before given to him to the collateral relations, in case he should not have issue male living at his death. So that, however prefaced, the codicil cut down *William*'s provision in a remarkable manner. That does not prove that the testator intended to cut down the daughter to a life interest, but it shows that the introductory words would not stand in the way of that construction. Could he intend to leave his daughter's children without a provision in favour of collaterals? This was the difficulty. But he did intend to leave his son's daughters, and indeed all his son's issue, without a provision through him, unless the son had issue *male* living at his death. He preferred his sister, for example, and her daughters to his son's daughters, if the son when he died had not issue male living. He took no notice of his daughter's children in any of his three codicils, and it was only by implication that the daughter could take a perpetuity in anything beyond the annuity given to her and her children by the will. At last therefore the question was, whether the testator intended by the second codicil to dispose of the property representing the annuities. This question cannot be disposed of satisfactorily without fully considering the meaning of the words "after the decease of my wife and my daughter." The only law Lord who referred to the operation of these words thought they only indicated the time at which the gift to the collateral relations was to take effect, and not what was meant to be given to them. But why, it may be asked, postpone till that period the possession of the residue if William should sooner die without leaving issue male? "In case William die without leaving issue male, after the decease of my wife and daughter my remaining property shall *then* be divided,"

&c., and the children of the sister and brother *then* living are to take. If the testator considered that after the death of his wife (who had but her annuity for life) and of his daughter the bulk of the property would be in his disposition, the gift is a reasonable one, otherwise it is irrational. If the daughter took a perpetual annuity, her death would have been wholly without bearing upon the gift over. It was only with reference to property that the clause as to the deaths of his wife and daughter could have been introduced. It requires also to be observed that by the will the 200 *l.* per annum was given over to William and the two daughters equally, and by the first codicil Mary's 100 *l.* a year was given to William and his surviving sister. These interests the testator clearly meant to give over, and they actually *included* the 200 *l.* a year given to the wife: so that the fund representing William's share of that annuity would clearly pass by the second codicil, and it would be no answer to say that if not appropriated, the interests *pro tanto* would merge in the residue; for the widow and daughter might have required an appropriation, and at all events the circumstances show that the testator was disposing of the fund liable to answer some of the annuities. The second codicil was considered a continuation of his will: the third partakes much more of that character. One learned Lord, as we have seen, thought that the third codicil materially supported the conclusion to which the House came: but on the contrary, it seems to prove that the testator was dealing with "the whole of the property he left" "and the actual amount of income, whatever it might be," although by that codicil only for a limited period.

This case, which deserves the student's attention, reflects no credit on the law as a science: the gift was decided on the original hearing to be a perpetuity on a ground which was not afterwards supported, and that ground could not support the gifts throughout according to the decision: upon the rehearing it was decided to be a perpetuity on another

ground, but to have been cut down to a life interest upon a new ground; and upon the appeal the case was decided upon a different ground, and the perpetuity was supported (I).

10. We may here introduce the case of Thornhill *v.* Hall (*a*), which can only serve as a precedent for the general rule upon which the House of Lords acted. The testator having several leases for lives of separate estates, disposed of several of them by his will to his wife and children, prefacing each devise by a statement of his interest in the particular property, and after such statement he gave 200*l.* per annum of the profit rent to his son Robert, for his sole use and benefit during the term of such lease, being for the testator's, his own, and his brother George's life; the residue of the profit rent he left to his son George for his sole use and benefit, any benefit arising out of the said lease by rise of rents or times to be for the benefit of his son Robert. Then after several other gifts he left a profit rent of another leasehold amongst his three unmarried daughters in certain proportions, and if any of the above legatees should die or die unmarried, he left the property bequeathed to them to be divided equally among the survivor or survivors of them; and also in like manner if any of the lives in the leases should die so as to leave any of the legatees unprovided for by the lapse or fall of said life or lives in any of the above bequests,

(*o*) 2 Cla. & Fin. 22; 8 Bligh, N. S. 88.

(I) "Lord Cottenham: The result will be, that the *decree upon the rehearing* is reversed altogether, with costs." 12 Cla. & Fin. 203; and see p. 202. This was incorrect. The rehearing embraced the questions considered in the text, and two important points of law besides; one whether the collaterals took *per stirpes* or *per capita*; the other whether interests under a settlement were vested subject to be divested by an execution of a power by will. Upon both the points of law the original decree was reversed, and from that reversal there was no appeal. In regard to the question of perpetuity, it was only by adopting the opinion pronounced on the rehearing, that the original decree on that point could be maintained in its whole extent.

that in such case a proportion should be equally deducted from the bequests of each to make up the deficiency by the determination of such lease as it shall so happen to fall, in proportion to the loss sustained and in proportion of the property of the survivor or survivors. And notwithstanding this concluding direction was connected with the gift over, if any of the above legatees should die or die unmarried, it was determined by the Court of Exchequer in Ireland, and ultimately by the House of Lords, that the gift over did not affect the devise to Robert, but was confined to the devise to the three daughters principally on the ground that the devise was clearly and expressly to Robert for the lives, including his own, and the gift over was not sufficiently clear to control that gift.

II. We are now to consider the cases in which the devisee has been held to take an estate tail:

1. The important case of Jesson *v.* Wright (*p*), established rules of construction on this head which should never be lost sight of. The testator in that case gave certain hereditaments to William, an illegitimate son of his sister, to hold for and *during his life*, he keeping the buildings in repair, and after his decease he gave the said hereditaments, &c. unto the *heirs of the body* of William lawfully issuing, in such shares and proportions as he should by deed or will appoint (*q*). And for want of such appointment to the *heirs of the body* of William lawfully issuing, share and share alike as tenants in common, and if but *one child* the whole to *such only child*, and for *want of such issue* to his right heirs. The Court of King's Bench held that William took only for life with remainder to his children for life. Lord Ellenborough was of opinion that the words "heirs of the body," which in their

(*p*) 5 Mau. & Selw. 95; 2 Bligh, 1: the last 12 pages of what appears as the argument for the plaintiffs in error are merely a copy of the printed reasons, and ought not to have been added to the argument. Doe *v.* Woodall, 3 Mann. G. & S. 349.

(*q*) See 2 Sugd. Pow. 266.

ordinary and natural sense import an estate tail, meant in this instance, children only. He relied upon the power of appointment and the gift in default of appointment as tenants in common, and considered that the testator had by his own construction of "heirs of the body" described children, and that the devise over meant, for want of such children. Mr. Justice Bayley was entirely of the same opinion, and he went much further; he held that in the clause, which contained a power of appointment, it was impossible the testator could have used the words as words of limitation; they gave a new estate to the objects of that power as purchasers. If so, he added, we have established the meaning of the words "heirs of the body" in one clause. The next clause was in default of appointment to the heirs of the body of William. Had the testator stopped there the presumption would have been that he, after having used the words "heirs of the body," when they could not have been intended as words of limitation, was again using them in the same sense, that is, not to enlarge the former estate, but to create estates by purchase. But the contrary was admitted in the House of Lords by the counsel for the defendants in error (*r*). Upon an appeal to the House of Lords, the judgment of the Court of King's Bench was reversed (I).

2. Lord Eldon thought that the rule by which the particular was to be sacrificed to the general intent had become a landmark. After observing, that stopping after the first limitation to the heirs of the body it was clear William would be tenant in tail, he added, that in order to cut down this estate tail it was absolutely necessary that a particular intent should be found to control and alter it, as clear as the

(*r*) 2 Bligh, 42.

(I) The arguments of Lord Eldon and Lord Redesdale have sometimes been thought not sufficiently full for such a case. Mr. Bligh's report of them agrees in all points with the note which I took at the time. The Judges of B. R., it was understood, thought that the Judges ought to have been required to attend the hearing.

general intent here expressed. The word heirs of the body would indeed yield to a clear particular intent that the estate should be only for life, and that might be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal. Children, he added, were included undoubtedly in heirs of the body, and if there had been but one child he would have been heir of the body, and his issue would have been heirs of the body; but because children were included in the words heirs of the body, it did not follow that heirs of the body must mean only children, when you can find upon the will a more general intent, comprehending more objects. He thought it clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. Lord Redesdale observed that it was dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. That the general intent should overrule the particular was not the most accurate expression of the principle. The rule was, that technical words should have their legal effect, unless from subsequent inconsistent words it was very clear that the testator meant otherwise (*s*). As to the words "tenants in common," it did not follow that the testator did not intend that heirs of the body should take because they could not take in the mode prescribed. This only followed, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification were to be rejected. He saw no ground to restrict the words, heirs of the body, to mean children in this case.

3. In Montgomery *v.* Montgomery, in Ireland (*t*), where

(*s*) Doe *v.* Gallini, 5 Barn. & Adol. 621; 3 Adol. & Ell. 340; and see 9 Cla. & Fin. 686; Doe *v.* Woodall, 3 Man. & Gran. N. S. 349.

(*t*) 1845, 3 Jo. & Lat. 47. See Wollen *v.* Andrewes, 2 Bing. 126; Reece *v.* Steel, 2 Sim. 233; Willcox *v.* Bellaers, Turn. & Russ. 491; Lees *v.*

the Chancellor reviewed the cases, he observed that Lord Kenyon, who was a profound real property lawyer, followed up the case of Robinson v. Robinson, 1 Burr. 38, by holding, in the great majority of the cases before him, that the parent took an estate tail to preserve the general intent. Succeeding Judges endeavoured to restrain the rule, where no paramount intent was expressed, and where it was not inconsistent with any express devise in the will, that the particular intent should prevail. At length the decision was made in Doe v. Jesson, which was corrected upon appeal to the House of Lords, which decision restored the law.

4. In Jesson and Wright, Lord Eldon observed that Doe v. Goff, 11 East, 668 (*u*), was difficult to reconcile with the case before the House; he did not say impossible, but that case was as difficult to be reconciled with other cases. Lord Redesdale went further, and said it was impossible to decide the case of Doe and Jesson, without holding Doe v. Goff was not law, and that case is generally considered as overruled. The devise in Doe v. Goff was to the testator's daughter, and the heirs of her body begotten, or to be begotten, as tenants in common, and not as joint tenants, with a gift over, if such issue should die before he, she, or they should respectively attain their age or ages of 21 years, and (with assistance derived from another devise in the will to the same class) it was held to operate as words of purchase, the parent taking only for life, and the children as purchasers. But the Court did not decide whether the children took estates tail, as it should seem if they took by purchase they might have done; nor whether cross remainders could be supplied. In a case in Ireland (*x*), the Chancellor observed that it did not appear to him necessarily to follow that Doe v. Goff must

Mosley, 1 Yo. & Col. 589; Doe v. Harvey, 4 Barn. & Cress. 610; 3 Jo. & Lat. 55; Doe v. Featherstone, 1 Barn. & Adol. 944; North v. Martin, 6 Sim. 266, a case under a settlement.

(*u*) As to Gretton v. Hayward, see Abram v. Ward, 6 Hare, 165.

(*x*) Montgomery v. Montgomery, 3 Jo. & Lat. 47; 8 Irish Eq. Rep. 740.

be considered as overruled. From Lord Redesdale's observations he inferred that he (Lord R.) considered that the children in Doe *v.* Goff were held to take as purchasers for life only. But the Court of King's Bench did not so decide, and as the devise was to the heirs of the body, the persons taking under that gift as purchasers would yet take estates of inheritance. If cross remainders could be created, the Court came, it would seem, to a right conclusion. If they could not, still a similar case would be open to consideration. Doe *v.* Jesson only decided that the words heirs of the body should operate as words of limitation, where otherwise the issue would not take estates of inheritance. It did not follow that the same rule was to be applied where the children taking as purchasers were entitled to estates tail, and the contest was whether the father should take an estate tail instead of the children, or the gift over, in default of issue, should have its legal operation. It was, he added, of deep importance that the case of Doe v. Jesson should be put on its true grounds.

5. The case of Doe *v.* Jesson was followed by a case not free from difficulty, having regard to former authorities. I allude to Fetherston *v.* Fetherston (*y*). The devise was to William F. and his heirs male according to their seniority in age and their respectively attaining 21 years, the elder son surviving of the said W. F. and the heirs male of his body, lawfully begotten, always to be preferred to the second or younger son; and in case of failure of issue male of William surviving him, or their dying unmarried and without lawful issue, attaining the age of 21 years, then to Theobald F., brother of William, and his heirs male lawfully begotten, on attaining the age of 21 years, the elder to be preferred to the younger; and in case of the death or failure of issue male of the said Theobald, lawfully begotten, and their not attaining the age of 21 years, to his own right heirs for ever. The Court of King's Bench in Ireland held that William

(*y*) 3 Cla. & Fin. 67; 9 Bligh, N. S. 237.

took an estate tail, that judgment was affirmed in error in the Exchequer Chamber there, and the latter judgment was affirmed by the House of Lords. The opinion of the Judges, as delivered by Tindal, C. J., was, that the devise to William and his heirs male gave a clear estate in tail; that the first taker shall be held to take an estate tail where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator appears so plainly to the contrary that no one could misunderstand it; that the subsequent words in this case did not show a plain intention to reduce the estate tail to an estate for life, on the contrary they were at least as compatible with an explanation of what the testator supposed to be the course of descent under an estate tail, for if William took in tail then "his heirs male" would take "according to the seniority in age," and the eldest son, if he survived, and "the heirs male of his body lawfully begotten" would always be preferred to the second or younger son, and the clause which provided what should happen if there should be a general failure of issue of William before the estate went over to Theobald, was directly consistent with an estate tail in William. The Chief Justice added that the words which appeared to denote some intention in the testator that "the heirs male shall take on attaining 21," could not be urged against the estate in William being held to be an estate tail; first, because those words would create the same difficulty against the holding the estate given to the sons of William to be an estate tail, which on all hands was allowed to be the case if William had not the estate tail in himself; and, secondly, because if the devise in other respects was a devise in tail the testator could not by interposing such a condition (if indeed it was to be held to be a condition in this will) create a new estate or a new course of descent not known to the law. These latter reasons seem open to observation. The words referring to the attainment by the heirs male of the age of 21 years, were a powerful indication of the intention that they should take

by purchase, and they would not create any difficulty against holding the estate given to the sons of William to be an estate tail, for they would either denote the time when they were to take in possession, or the words might be modified, nor (assuming it to be a condition) was it any attempt to create a new estate or a new course of descent not known to the law. Whether the sons were not to take till 21, or whether the estate was to go over if none attained 21 and left no issue, yet the estate tail would be regularly created and the gift over might be made contingent on the happening of any event upon which the testator thought fit to make it dependent. The reference to the age of the takers and the gift over, not generally but on a contingency, were no obstacles in the way of the first taker (according to the intention) taking an estate tail, but they were an indication that the testator did not intend William to take such an estate.

6. In a previous case (*z*), in which the testator named and appointed his universal heir his great nephew Thomas Jenkins, son of his nephew William, to whom he gave all his lands, &c., but not to be put in possession till 21. If he should marry and have a child or children, if living at his death, the testator directed that his estates should descend to his eldest son, and if he had other legitimate children, that out of his estates should be paid 1,000 *l.* to each of the said children, but if he left one daughter only, 3,000 *l.*; it was always to be understood that if Thomas should have more sons than one, if the eldest should die before his father he was to be succeeded by his second son, and so on to the third, &c.; the eldest son of Thomas who might be living at his father's death was always to be considered as heir to the estate. Should Thomas leave no male child, 2,000 *l.* to each female, and if but one daughter, 3,000 *l.* as before

(*z*) Herries *v.* Jenkins, 4 Madd. 67; 6 Sim. 168, n.; Printed Cases, D. P. 1823, in which, for the respondent, I cited, I observe, nearly all the cases.

expressed. If Thomas should not leave any son at his death, his next brother to succeed to the estate, and so on in case of failure of male heirs to the third, fourth, &c.; the eldest great nephew living always was to be considered as his legitimate heir in case of failure of the other brothers, his will being that his estate should always descend in the male line [with the like provisions for daughters]. Should it happen that all the sons of William should die without having a son or sons, in such case the estates should devolve and be the property of his nephew Joseph on the same condition relative to his heirs and descendants male and female, as expressed regarding his great nephew Thomas and his brothers. And if Joseph should die without a legitimate son, the estates to descend to his nephew Thomas and his heirs, on the same conditions as expressed relative to Joseph. Thomas suffered a recovery, and contracted to sell a part of the estate. Upon a bill filed against the purchaser, a case was sent to the Court of King's Bench, who certified that Thomas took an estate tail, and Sir Thomas Plumer, V. C., decreed a specific performance (I). Upon a further sale another bill was filed against the second purchaser, and Sir John Leach, V. C., held that an estate tail passed and overruled an exception to the Master's Report that the seller had a good title. From this order there was an appeal to the House of Lords. It was insisted for the appellant that Thomas Jenkins did not take an estate tail, but only an estate for life with remainder in fee to his eldest surviving son, with alternate or substituted remainders or limitations over, in case he should die without having a son living at his death. Lord Eldon, C., prevented the House from coming to a decision on the question, because the court below had not yet decided that the title was so clearly good as to be

(I) If I recollect rightly, this was a contract set up in order to obtain a judgment on the title before an actual sale. This was a plan frequently resorted to, but it was properly put a stop to by the Judges.

binding upon an unwilling purchaser. The appeal was directed to stand over until the cause should have been heard on further directions (*a*). It was not again brought before the House, and the contract, I think, was abandoned.

7. In Murthwaite *v.* Jenkinson (*b*), words confining the devisees to life estates, and in the first instance directing their issue to take for life in like manner were not allowed as to real estate to prevail against the intention to provide for all the issue in a course of descent, to effect which the parents were held to take estates tail, but they were, on the settled distinction, held to take life interests only in the personal property. The testator devised all the rents, issues, and profits of all the residue of his estate and effects, as well real as personal (1), to his three nieces, equally to be divided between them for their respective lives; and after the decease of them, or either of them, the lawful issue of them and each of them should have and enjoy his or her mother's share of such rents, dividends, and profits for life in like manner. And if either of his said nieces should happen to die in the lifetime of the others or other of them without issue of her body lawfully begotten, the share of her so dying without issue should go to and be shared equally between the survivors of his said nieces for their respective lives, and afterwards by the lawful issue of the survivors of his said nieces in like manner. And if all his nieces and their issue (save one) should die without issue lawfully begotten, then such surviving niece should have and enjoy the whole of the rents, &c. for her life. And after her decease the lawful issue of such surviving niece, if more

(*a*) See Sugd. Pow. 511.

(*b*) Printed Cases, D. P. 1825. I was of counsel for George Barnard, the son of one of the nieces, who maintained the decision as to the personal estate, and appealed from the decision as to the real estate, insisting that life estates only passed to the nieces.

(1) There was a previous devise to trustees, which was held to carry the legal fee, but the will was treated as beginning with the passage in the text, in order to obtain the opinions of the Judges as upon legal devises.

than one, should have and enjoy the whole rents, &c. equally between them; and if but one, such only one should have and enjoy the whole of such part thereof as was personal for his or her own use, and to hold so much thereof as were freehold, to them and each of them, if more than one, their heirs and assigns, as tenants in common, and if but one, to such only one, his or her heirs and assigns for ever. And if all his nieces should die without issue, then after the decease of the survivor of them without issue, he devised the whole of such residue of his estate and effects, as well real as personal, to his next male heir of the name of Murthwaite, to hold to such male heir, his heirs, executors, and administrators in like manner. The will is a complicated one; the gifts are thus stated in my notes:

I. As regards the nieces:

To them equally for life.

If any die in the lifetime of the other or others without issue,

To the survivors for their lives equally.

If all and their issue, save one, die without issue,

To surviving niece for life.

II. As regards the issue of the nieces:

1. After the death of each niece,

To her issue for life.

2. After the death of each, taking a surviving share as above,

To her issue in like manner.

3. After the death of surviving niece taking all as above,

To her issue equally, or the whole to one, if one only; the personalty absolutely, the freehold in fee.

If all the nieces die without issue, after the decease of the survivor without issue, to next heir male, his heirs, executors, and administrators.

Upon a bill filed, the Vice Chancellor sent a case to the Common Pleas, and that Court certified that the three nieces took in the freeholds estates for life, with cross remainders between them for life, in the event of one or two of them dying without issue. And that John Barnard (the only child of one of the nieces) had an estate tail in remainder in his mother's third, subject to be divested in part by the birth of other children of his mother, whether sons or daughters: and that he would have an estate tail in the whole in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born (*c*). Their opinion, therefore, was that the nieces took respectively for life, with remainder to their children in tail. The Vice Chancellor decreed that the three nieces took only a present estate for life under the will in the real and personal estates. The nieces appealed to the Lord Chancellor, insisting that they took estates tail in the real and absolute interests in the personal property. It appears from my notes that the case was fully argued before him. He directed a case to the King's Bench, and the Judges of that court certified that the three nieces took estates tail in the freehold and absolute interests in the leasehold, and that George Barnard had not then any estate in the freehold or leasehold tenements. But should he survive the three nieces, and neither of them should have any other child, he would be tenant in tail of the freehold (I), but have no interest in the leasehold estates. Should he die in the lifetime of the three nieces, he would be seised of no freehold nor possessed of any leasehold estate (*d*). In neither court did the Judges state upon what grounds they proceeded. Littledale, in arguing in the King's Bench for John Barnard, the son of one of the nieces, in favour of an estate tail in his client, observed that with respect to the

(*c*) 2 Brod. & Bing. 623. (*d*) 2 Barn. & Cress. 389.

(I) This must mean if the estates tail, &c. were not barred.

clause devising to the surviving niece and her issue, it was clear they were to take as purchasers, for the devise was "to the issue and their heirs" (I). Mr. Justice Bayley asked, Suppose the surviving niece to have died without issue, and that another had before died leaving issue, would the clause to which you now refer give an estate tail to the issue of the latter? Was there any case deciding that the expression "if A. die without issue" can give an estate tail to a third person? To this the true answer was given:— The question of George Barnard taking an estate tail or not cannot depend on the contingency of the nieces dying in any particular order. Supposing his mother to live longest, an express estate tail was given; the same effect must therefore be extended by implication to the death of the nieces in any other order. Whereupon Abbott, C. J., observed that that still left the question open whether George Barnard took by purchase or by descent. The Chief Justice, of course, meant the question whether the mother or the son took an estate tail, but this was not answering the argument. The Court of Common Pleas probably were guided by this particular gift, under which a child of any one of the nieces might in event take; and by the implication arising from it as to the real intention of the other gifts. And they appear to have cut down the fee to an estate tail, in consequence of the words introducing the ultimate gift over.

8. The Lord Chancellor, on the 31st May 1824, decreed that the nieces were tenants in tail of the freeholds, but that they took only a present estate for life in the personal estate. From this decree there was an appeal and a cross appeal: the nieces, by their appeal, complaining that they were not decreed the absolute interest in the personal estate,

(I) During Sir Charles Wetherell's argument in the Court of Chancery in favour of estates tail in the nieces, Lord Eldon asked, Does not Barnard, if the only child, take the fee? To which it was answered, Certainly; the testator does seem to contemplate making the children of that niece purchasers.

and George Barnard, by the cross appeal, complaining that the nieces were not confined to life estates in the freeholds. There was nothing new in the arguments for and against an estate tail in the nieces. For the nieces taking the absolute interest in the personal estate, Mr. Shadwell, citing Forth *v.* Chapman, 1 P. Wms. 664, admitted it was a meagre case, and that the context of the will might control the rule. He referred to Crooke *v.* De Vandes, 9 Ves. 197; Porter *v.* Bradley, 3 T. Rep. 143, for the observations against Forth and Chapman; and observed that here the gift over was in case all died without issue; that the same words were used for both the real and personal estates; that they were not gifts by separate clauses. It might do if you could spell out anything which would look like a failure of issue at the death of the survivor of the nieces; but there were no such words here as *leave* or *behind him*. Tindal, who was with him, quoted Daw *v.* Lord Chatham, 3 Ves. Jun. 101, cited, and Barlow *v.* Salter, 17 Ves. 479. The House of Lords dismissed the original appeal, affirmed the decree, as far as complained of, and dismissed the cross appeal (*e*). So that, as to the personal estate, the Court of Common Pleas, the Vice Chancellor, the Lord Chancellor, and the House of Lords, all agreed that the nieces took only for life, although it was more difficult to come to that conclusion after it was determined that the nieces took estates tail in the freehold estate. It is a case of great importance. In a case (*f*) in which it was slightly referred to, it was said to be an example of the proper construction of the word "issue," which was considered as a word of limitation, embracing all the descendants, and in which the inconsistent intent that all their descendants should take for life (1) formed no reason why they should not take at all, and why the word should not be construed in its proper and legal sense.

(*e*) 30 January 1825, Printed Cases, D. P. MS. entry.

(*f*) Gallini *v.* Gallini, 5 Barn. & Adol. 644.

(1) See before the gift to the issue of the surviving niece.

9. In Houston *v.* Hughes (*g*), upon a case sent by the Master of the Rolls to the Court of Queen's Bench, that Court certified that the legal estate was vested in the trustees of the will, and declined to answer the question as to the rights of the parties beneficially entitled, supposing the legal estate not to have vested in the trustees (*h*). The will is too obscure to serve as a precedent. Lord Lyndhurst, C., decided that the testator's nieces, who, it was argued, were tenants in tail, took life estates only, and declined to decide any thing further. Upon an appeal to the House of Lords, this was justly made one subject of complaint, because it was said, the whole of the will should be construed together and at once, and a decree ought not to contain a declaration, excluding the claim of the appellants to an estate tail in the lands of inheritance, and to the absolute property of the leaseholds and personalty, unless it, at the same time, declare what is the true construction of the will, and what persons or classes of persons are to take after the expiration of the supposed life estates of the appellants (*i*); nevertheless the decree was affirmed. If this case were to be followed as a precedent, there are many cases in which, by simply declaring the first takers to be tenants for life, all the difficulties of construction would, for the moment, be avoided, and yet, when they could no longer be evaded, it might appear that, upon the true construction of the whole of the devise, the first takers were tenants in tail.

III. We have now to consider some important cases on the meaning of the words "eldest male lineal descendant," and "first male heir of a branch of the family," and of "issue in tail male."

1. In the great case of Thellusson *v.* Woodford (*k*), in

(*g*) 5 Russ. 116.
(*h*) 6 Barn. & Cress. 403.
(*i*) Printed Cases, D. P. 1831. I was of counsel for the appellants.
(*k*) 4 Ves. 227.

which the point was decided as to the validity of the accumulation directed by the testator, a point arose as to the certainty of the limitation of the estate itself, and who would be entitled to take under it. The estate, after the time appointed, was to be divided into three allotments, and one allotment was to be conveyed to the use of the eldest male lineal descendant then living of his son Peter in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was thereby directed to be limited of his son Peter, successively in tail male, with remainder in equal moieties to the eldest and every other male lineal descendant or descendants of his sons George and Charles, as tenants in common in tail male, in the same manner as before directed with respect to the eldest and every other male lineal descendant or descendants of Peter, with cross remainders between such male lineal descendants, as aforesaid, of his sons George and Charles in tail male, or in case there shall be but one such male lineal descendant, then to such one in tail male, with remainder to the trustees in fee in trust for the sinking fund. The other allotments were severally given to George and Charles, and their male lineal descendants in like manner, with like gifts over to the other brothers, &c. The testator directed the persons becoming entitled to any proportion of the estates, and all claiming under them respectively, to use the surname of Thellusson only, and in default thereof the produce of the estates was to go over to the sinking fund. And he directed that his trustees should, as any living should become void, present thereto a person who should be nominated by one of his sons in rotation, the eldest having the first nomination, and the like nomination to be made by the eldest male lineal descendant of his three sons respectively, in the order aforesaid, if he were by law capable of making such nomination, otherwise the eldest

male lineal descendant of the next brother was to present to such living. And in case when such livings became void, or in due time afterwards, no male lineal descendant of any of his sons should be capable of presenting thereto, the trustees were to present to such livings. Upon the original hearing the question was discussed in relation to the estates only, but not decided. Buller, J., said, a case was put upon the question between a son of a daughter and a grandson of a son in the male line, and it was asked which of them would be entitled? He should answer, the grandson of the son must take, for the testator intended to make an estate in tail male in the common usual course. We must look at the pedigree of the line that sprung from him, and the heir male of the family is the person to answer the description. It was expressed in a blundering way. The first blunder arose from the ignorance of the person who drew the will, that the words "heirs male" may be used as words of purchase. But the next limitation put it beyond all doubt, for he gave it to the second, third, fourth, and every other male lineal descendant or descendants, so that no younger son or descendant could take until failure of male descendants of the elder. It must necessarily mean a brother from the words that follow, "who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited (*l*)." Lord Alvanley, then Master of the Rolls, inclined to concur in this construction (*m*), and the Lord Chancellor was of opinion that the description of the persons to take was sufficiently certain, and upon the reasons given by Mr. Justice Buller there was no difficulty, in all the cases he could put, to declare who mas meant (*n*). The decree was affirmed in the House of Lords (*o*), and thus matters stood in 1805. Peter died and left a son John, and he had at the time when the contest was renewed two daughters and a son a few months old,

(*l*) 4 Ves. 326.
(*m*) Ib. 328.
(*n*) Ib. 343.
(*o*) 1 New Rep. 357.

and there were other children of Peter living. George died leaving two daughters, one of whom married and had issue a son, Henry, who claimed the right of presentation, and other children; Charles died and left a son, Charles, who had a son a few weeks old. Upon a living falling vacant, Henry, the grandson of George, claimed it as eldest male lineal descendant of George, and Charles, the son of Charles, the testator's son, also claimed it. Upon a bill filed by the first claimant, Henry, Lord Eldon, C., after a full argument, declared the right of presentation not to be in the plaintiff (*p*). This claim was intended to try the right to the estates. The limitations were to this effect:

The rents to accumulate during the lives and life of the following persons and classes:

1. Three sons, Peter, George, Charles,
2. Grandson John, son of Peter,
 Other sons of Peter,
3. Issue (*q*) of grandson John,
 Issue of any other son of Peter,
4. Sons of sons George and Charles,
5. Issue of such sons,

} living at testator's decease, or born in due time after.

After the decease of the survivor, the estates to be divided into three lots, and thus settled:

One allotment—

To the eldest male lineal descendant then living of son Peter in tail male; remainder

To the second, third, fourth, and every other male lineal descendant then living (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited) of his son Peter successively in tail male; remainder,

(*p*) 3 Myl. & Cra. 584. I was of counsel for the defendants, and I was also counsel for the respondents in the House of Lords. See Bernal *v.* Bernal, 3 Myl. & Cra. 559.

(*q*) See 3 Myl. & Cra. 600, 610, 613.

In equal moieties,

To the eldest and every other male lineal descendant or descendants, then living, of the sons George and Charles, as tenants in common in tail male, in the same manner, with cross remainders between them in tail male.

The second lot was settled in like manner, commencing with the son George; and the third lot in like manner, commencing with the son Charles.

The nomination to the advowsons was thus given:

To one of his said sons in rotation; the eldest having the first right.

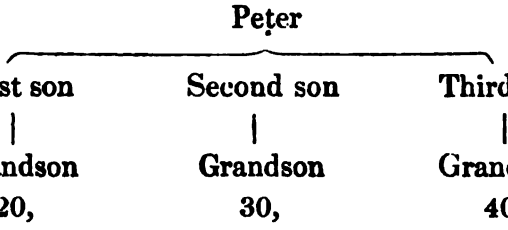
The like right to the eldest male lineal descendant of his three sons respectively, in the order aforesaid, if he be capable by law;

Otherwise the eldest male lineal descendant of the next brother to present.

If no male lineal descendant of any of them was capable, the trustees to present.

Lord Eldon, the grounds of whose opinion it is somewhat difficult to extract from the short-hand writer's copy of the judgment, relied upon the words "eldest male *lineal* descendant" being used in every instance, and it was clear that the person to take would take in tail male, so that with respect to his descendants, after he had taken by purchase, no female descendant of his could take, and no male descendant of his claiming through a female could take. The first question was, whether the word "eldest" meant eldest in age at the time the conveyance was to be made. He held that "eldest" meant "first" in ordinary succession in the male line; and secondly, that second, third, fourth, &c. meant second, third, fourth, &c. in ordinary succession in the male line; "every other" meant the same as fifth, sixth, seventh, &c. He thought that "male lineal descendant" must mean a male descendant in the male line; "lineal" was otherwise altogether surplusage;

thirdly, the words "incapable of taking as heirs in tail male" he thought might be looked upon as having a direct tendency to show that a descendant through a female could not take. His opinion was, that the person, the great grandson for instance, who became entitled to take, would take an estate in tail male; that his male descendants would take by descent; his next brother would be the second in the order of succession, and so it would go on through that class which constitutes the family, and his family being gone, it would go to the next son, and so go through his descendants. From this decree there was an appeal to the House of Lords, and the case of the appellant was elaborately argued in the Printed Cases. There was also a cross appeal by the heir-at-law, contending that the gift was uncertain and void. For the appellant, Henry, at the bar, it was insisted by Shadwell and Sidebotham that the priority was to be determined by age. If you find a lineal descendant, who is a male, and other persons who are lineal descendants, being males, the limitation is to the eldest, with remainder to the second and other children; so that if the pedigree stood thus:



the latter would be the first taken. There is no distinction between lineal descendant and descendant. If he had said male line, that would have done: Blackstone distinguishes between lineal and collateral, and here it is used in contradistinction to collateral. By second, third, fourth, &c. he means second eldest, third eldest, &c., in seniority after the eldest is disposed of. If he had meant males through males, he could have easily expressed it. Lineal descendant is not a technical expression. Descendant of sons

claiming through females is incapable of taking as heir male, therefore words over apply to him. All males claiming through males could take as heirs male of the body. There can be no second heir male; a devise to him would be void. Nonage is no incapacity to present. In the advowson clause eldest means in point of age. Henry, the appellant, is a lineal descendant, a male lineal descendant, and the eldest male lineal descendant of George, the second son. The clause as to name, means taking the name *de novo*. Who is entitled if the appellant is not? A sketch may be added of the writer's argument at the bar of the House of Lords on the other side; it is the only one on that side of which he has a note; it was to this effect:

The testator directed the accumulation only during the lives of sons of sons and issue of grandsons; he did not extend it to sons or issue of daughters. He excluded, 1, his own daughters; 2, the issue of his daughters; 3, the daughters of his sons; 4, the issue of daughters of his sons. The words eldest male lineal descendant mean according to branch or line: other males intended to take would take under subsequent words. They will take being collaterals. The remainder over is to the second, third, fourth, &c., *not* according to seniority of age or the like. This is observable throughout. Eldest means most worthy, or first in branch. There could be but one heir male. A limitation to "the heir male of the body then living" would not do. He could not, then, have described the other males so as to take by purchase. Therefore he said *eldest*, which is used in opposition to second, and means first. If the testator, as we contend, only meant males springing from males, a general limitation "to the heirs male of the body of George" would not have met the intention: it would include all he meant to include and *more*, for he intended that the *first* taker should be the heir male *living* at the time the accumulations should cease. The descendant was to be a male, and to have the name, for he was to use it, and he was to take an

estate in tail male. The gifts over are satisfied by admitting male collaterals of the previous tenants in tail, and do not include males claiming through females. There can be one heir male only, strictly speaking, but other males in default of him would be heirs, and they are all provided for. It was objected that the testator would have preferred the appellant to the sinking fund. Answer: He has expressly excluded heirs female, and also his own three daughters living, and *all* their issue, *male* as well as female. No provision is made for daughters or their issue; therefore their lives were not included in the accumulation. As the accumulation is not continued during the lives of his daughters, if the appellant's view were to prevail, a son born in the testator's lifetime of a daughter might, upon the accumulation ceasing, take during the daughter's lifetime. Objection: The clause as to using the name. Answer: The devise is to take effect probably at the end of 70 or 80 years; the name might be changed. Peter's son is now Lord Rendlesham. The clause extends "to all claiming under him or them," and their names might not be Thellusson. He disappointed his sons' expectations. Might they not disappoint his ambition? As to the presentation, the substitution shows that the testator meant the male lineal descendant to nominate when all the sons were dead: he intended the sons to present until the issue became entitled. He did not intend the trustees should present in preference to the sons.

The Judges attended, and were of opinion that the appellant claiming through a female was not entitled. They thought the words "eldest male lineal descendants" of his three sons designated male persons descended from such sons in the male line only. The word "lineal" was introduced in order to intimate the testator's desire that the person to nominate should be a male descendant of a son in the male line. The estate to be limited of every allotment was an estate in tail male. When the testator contemplated the failure of these estates in tail male, and engrafted upon

that contingency the ultimate gift to the public, his mode of expressing the failure of these estates in tail male was to use the very language in question. He said, "Upon failure of male lineal descendants of my three sons (I), I direct my estate to be sold," &c. This proved that the framer of the will by the words "male lineal descendant" meant descendants in the male line, for they described the failure of an estate in tail male, which is a failure of descendants in the male line. These were convertible expressions and propositions. They considered this as an exposition by the testator that the sense in which he used the words "male branch" was to signify the male line. The Judges thought that the clause as to the surname did not materially assist either of the constructions contended for, and they were of opinion that the infant grandson was, notwithstanding his infancy, capable of nominating to the living. Thereupon the cross appeal was dismissed, and in the original appeal it was declared that the plaintiff in the court below was not entitled to any relief by his bill, and the cause was remitted to the Court of Chancery (*r*).

2. We must now give our attention to the case of Doe *v.* Perratt (*s*), upon which a great diversity of opinion prevailed. The testator, Emanuel Chilcott, when his will was made, had survived his father and his two uncles. The father was the eldest brother, John the next, and Richard the third. The testator died in 1787, and had no issue. When the will was made, John, of London, the son of John, the uncle, was living, and he had a daughter, Sarah, and there were five daughters of Richard living, Mary, Joan, Sarah, Betty, and Agnes. Mary, the eldest, had a daughter, Betty; Joan, the

(*r*) 23 Jan. 1825, Printed Cases.

(*s*) 5 Barn. & Cress. 198. See Carne *v.* Roch, 7 Bing. 224.

(I) In the direction to stand seised in trust to sell, the words "as aforesaid" were added in the passage stated in the text; and Lord Eldon, when the case was before him, thought this took away the force of the words relied upon by the Judges. 3 Myl. & Cra. 603, 604.

second, had two sons, Thomas Chilcott Winter and Isaac Winter; Sarah, the third, had two sons; Betty, the fourth, had a son, Thomas Viney; Agnes had a son. And the above five daughters of Richard and their abovenamed several descendants were well known to the testator, but it was not found as a fact that he knew that Richard was dead.

In this state of his family, in March 1786, Emanuel made his will, and he gave to Ann White a cottage during her life, and he gave to Eleanor White half of Truckwell estate during her life; all the rest of his estates he gave unto Elizabeth, his wife, during her life, and he allowed her to give what she thought proper of her said effects to her sisters, Eleanor and Ann White, during their natural lives [under which power the widow appointed the estate to Eleanor White during her life]: and after the above lives being expired, that is to say, Elizabeth Chilcott, Eleanor White, and Ann White, all the lands, &c., of Truckwell estate to come to John Chilcott, his kinsman, living in London, or his male heir, if any; free land not to be sold nor mortgaged on any account whatsoever, but to remain in the Chilcott's family for land of inheritance. And if no male heir lawfully begotten by the said John Chilcott, then the above lands to fall to the first male heir of the branch of his uncle Richard Chilcott's family, paying unto such of the daughters of Richard who should be then living the sum of 100 *l.* each at the time of taking possession of the aforesaid estates.

The last life estate endured till July 1820. John Chilcott, of London, the devisee, who was also the testator's heir-at-law, died in 1808, without issue; and John Slade was a claimant under his daughter, in respect of the title as heir in law, in case the devise over was void for uncertainty. There were several claimants under the devise over: 1. Mary, the eldest daughter of the uncle Richard, died before the last tenant for life, and left her daughter Betty and a grandson,

Matthew Perratt, the son of Betty, and he was one of the three claimants. 2. Joan, the second daughter of Richard, survived the last tenant for life, and left her second son Isaac, surviving her (the eldest, Thomas Chilcott Winter, having died in her lifetime, without issue), and Isaac was one of the claimants through his brother. 3. Betty, the fourth daughter of Richard, died in the lifetime of the last tenant for life, and left a son, Thomas, who afterwards devised to his widow in fee, and died, and left a son, Thomas; and the widow and Thomas were also claimants. 4. Agnes, the fifth daughter, was still living, and had a son, Thomas, and he was likewise a claimant, but his claim could not, in any view of the case, be maintained. Betty, the fourth daughter of Richard, died first of the five daughters; Mary, the eldest, died next, then Sarah, the third, died, and lastly Joan died, and she only of the four survived the last tenant for life. Matthew Perratt was in possession of the estates. Three ejectments were brought; the first by Isaac Winter, the second by the Vineys, and by Thomas, the son of Agnes, and the third by Slade. Mr. Justice Holroyd and Mr. Justice Littledale were of opinion that Thomas Viney became entitled as the first male heir of the branch of Richard's family; whilst Mr. Justice Bayley thought that Isaac Winter answered the description, as the son of the eldest of the daughters who had a son; and he held it to be immaterial that his mother was living when the remainder vested, as the life or death of the mothers was foreign to the apparent intention of the testator. But of course the judgment was in favour of Catherine Viney, in the ejectment on her title, and for the defendant in the two other ejectments. Matthew Perratt did not disturb this judgment, nor did Slade, who claimed under the heir-at-law. Isaac Winter, however, brought a writ of error in the House of Lords, which was *bonâ fide* opposed by Matthew Perratt. The case was elaborately argued in 1832 (*t*), and five Judges

(*t*) Printed Cases, D. P. I was of counsel with Mr. Cowling for the

delivered their opinions to the House (*u*). Taunton, J., and Bosanquet, J., were in favour of Matthew Perratt, and Tindal, C. J., although in favour of an intestacy, thought that an heir apparent might have taken; Littledale, J., was for Viney, and Bayley, B., for Isaac Winter. The further consideration of the case then stood over till 1841 (*v*). In the reasons for the respondent, as well as in the argument at the bar, in 1832, Matthew Perratt relied not only upon his own title, but also upon the titles of Viney and the heir-at-law, as against the appellant, Isaac Winter. So far, the opinions of the six Judges who had given opinions upon the subject, were thus divided: Littledale and Holroyd were for Viney, Bosanquet and Taunton for Perratt, Bayley for Winter, and Tindal for an intestacy. After the case had been re-argued in 1841, six Judges, of whom five had not before delivered any opinion on the case, were thus ranged: Coltman, J., Maule, J., and Parke, B., were for Viney, making altogether five Judges for his claim: Williams, J., was for Isaac Winter, which made two Judges on his side. Patteson, J., agreed with Tindal, C. J., for an intestacy; so that no Judge, upon this hearing, was in favour of Matthew Perratt. Lord Brougham gave his opinion in favour of Viney. Lord Cottenham said that it was impossible that the authority of the Judges could be more equally divided; the majority, however, was against the title of Viney. [It should, however, be kept in view that five Judges were in favour of the title of Viney, whilst the six who were of a contrary opinion were two for Isaac Winter, two for Matthew Perratt, and two for an intestacy]. He expressed his opinion in favour of a person's taking, whose ancestor was living, and without pointing out who was entitled, thought that the decision of the King's Bench

respondent; Mr. Preston and Mr. Jeremy were for the appellant. I suppose there was a compromise between Perratt and Viney.

(*u*) 10 Bing. 198; 9 Cla. & Fin. 612.

(*v*) 9 Cla. & Fin. 641; 6 Mann. & Grang. 314.

ought to be reversed. It was at length discovered that the record in the case of Viney had not been brought by writ of error before the House, and therefore as the House did not adopt the opinions of Bayley, B., and Williams, J., in favour of Isaac Winter, the judgment in the Court of King's Bench in Winter's ejectment was confirmed. It was ordered that the judgment of the Court of King's Bench, in the case of Doe dem. Winter *v.* Perratt, be affirmed, and that the record should be remitted, to the end that such proceedings might be had thereupon as if no writ of error had been brought into this House. This left the judgment below in favour of Viney untouched (*w*).

3. In this case some important points were resolved. All agreed, 1. That the estate devised to the first heir male of the branch of his uncle Richard's family was a contingent remainder in fee simple, and not in tail, in favour of one person. First heir male was a word of purchase, and a mere designation of the person to take. It was in the singular number, and excluded plurality, and the charge created by the direction to pay 100*l.* each to the daughters of Richard enlarged the interest to a fee. 2. That when once vested it could not become divested in order to admit another acquiring a preferable claim. It was decided in the King's Bench that the fourth daughter having first died during the particular estate, leaving a son, that son took the remainder in fee, and this decision has not been disturbed. It was a consequence of this decision that the son of Joan, the second daughter, who survived the particular estate, did not become entitled, and that was affirmed in the House of Lords.

4. The great controversy was between the claims of

(*w*) It is stated by mistake in 6 Mann. & Gran. 385, that the judgment in favour of Thomas Viney was affirmed. The reporter was no doubt misled by what passed in the House of Lords. In a learned and accurate work it is stated that the House of Lords, reversing a judgment of the King's Bench, held that Matthew Perratt was entitled; 2 Jurm. Wills, 12, 16, 17, 18. This could not be, as Matthew did not carry the case by writ of error to the Lords.

Matthew Perratt, the grandson of the eldest daughter, whose mother was still living, and Betty Viney's son (she being dead). This question mainly depended upon the point whether the testator meant a person to take whose parent was living; or, in other words, whether he meant the heir of a deceased ancestor, or an heir apparent. Against the latter view the maxim in the law, *nemo est hæres viventis*, was relied upon. It was admitted that in favour of the intention the word heir might mean heir apparent; but in this will there was nothing to show that the testator did intend it to mean heir apparent. No preference was shown to any of the daughters, or of their descendants; they were all treated alike, when there was a sum of 100*l.* directed to be paid to such of them as should be alive when the remainder-man came to the estate. Under the devise to John Chilcott or his male heir, no person could take unless he was, or until he came under the description of, "male heir," within the maxim *nemo est hæres viventis*. The testator's intent was considered to have been, that when there came to be a male heir instead of a female one (which could only be by there arising a male heir within the above maxim), the estate should vest in such male heir, and the testator contemplated that there would, or at least might be, such a male heir, by the death in the interim of some at least of those female heirs, the daughters of Richard, as appears by the condition to pay the 100*l.* to such of his daughters which should be then living. The person who first became such male heir, in the strict sense of the expression, was Thomas Viney, who, on the death of his mother in the lifetime of the tenant for life, became the male heir of the body of his mother, and her sole heir within that strict sense of the above maxim, and became also the first male heir of the body of Richard in order of time, according to that strict sense, though not his true and complete heir, but such a male heir as under the denomination of heir male in a will to be capable of taking as a purchaser. On the other hand, it was urged that if the rule *quod nemo est hæres viventis* were applicable here,

the devise in favour of Richard Chilcott's branch would altogether have failed had the testator's widow made no devise in favour of her sister Eleanor, so as to postpone the time when Richard's branch was to take, because at her death all Richard's daughters were living; or had Eleanor died before any of those daughters, the same consequence would have followed. The word heir might be considered as including the heir apparent, notwithstanding the mother was alive, it being clear she was not to take. The testator clearly meant that the devisee should take, not with reference to his character as heir male, but as male descendant of some one of Richard's daughters, whether they should be living or dead; for though it was true he contemplated the possibility of some dying before the vesting of the remainder, yet if all were living, according to the will, all were to receive legacies, and to be paid by the very devisee himself, the heir, that is, of a living ancestor. Consistently with the will, the heir might be called upon to pay his mother (I). The testator used the phrase male heir, not in its strict legal sense, but in its popular acceptation, as "heir male apparent," or "male descendant." It is observable that although only two Judges were in favour of the claim of Matthew Perratt, yet five of them and the Lord Chancellor were of opinion that the devise meant a person whose ancestor might be living; for although Bayley, J., Patteson, J., and Tindal, C. J., were adverse to Matthew's claim, yet they all concurred that it was no objection that the ancestor of the person answering the description might be living. This seems to be the view in which most real property lawyers would concur. My own opinion, after much consideration of the case, is in favour of Matthew Perratt's title.

(I) See 9 Cla. & Fin. 618, per Taunt. J.; 677 per Tindal, C. J. This seems the true view, and not that in p. 696, per Lord Brougham, that it was a remainder to the heir of *B*, he paying so much to his surviving aunts on taking possession, or remainder to the heir of one of five sisters, he paying such of the others as may be alive when he takes possession, that is, he paying such of his aunts as may survive his mother.

5. The next question was, what was the meaning of the word *first* heir male, and of the words, *of the branch of my uncle Richard Chilcott's family*. We have seen that the only decisions arrived at, were, in the King's Bench, that the son of the fourth daughter, although he was not the firstborn son of any of the daughters, was entitled, as his mother first died before the tenant for life; and in the King's Bench and the House of Lords, that the son of Joan, the firstborn son of any of the daughters whose mother did not die until after the life estate determined, was not entitled. The several constructions were, 1. That the testator meant "first" according to dignity of descent, as coming from the elder and worthier branch. This was the opinion of Taunton, J., and Bosanquet, J. 2. That the testator intended firstborn in order of time; this was supported by Bayley, J., and Williams, J., but overruled both in the King's Bench and the House of Lords. 3. That the meaning was, the first who is actual heir male by the death of his mother; that is, the son of such one of the daughters of Richard who dies first. This was decided in the King's Bench by Littledale, J., and Holroyd, J., whose view was adopted by Coltman, J., Maule, J., and Parke, B.; and by Lord Brougham (*x*). And, finally, Tindal, C. J., and Patteson, J., thought that the devise was void for uncertainty (*y*).

6. Upon the question, at what time the remainder vested in interest, the Judges who supported Viney's claim held that it vested on the death of his mother, Betty, whilst those who argued for Matthew Perratt held that it vested on the death of his grandmother, Mary, and this view was supported even by some of those Judges who did not think Matthew entitled. Tindal, C. J., who held the devise void for uncertainty, nevertheless said he thought that the remainder vested in interest as soon as there was any person in existence answering to the *descriptio personæ* contained in the will, of first male heir of the branch of Richard's

(*x*) See 9 Cla. & Fin. 679. (*y*) Vide *infra*.

family, and therefore capable of taking under that description. For he took it to be a general rule with respect to the vesting of contingent remainders, that they must vest at the earliest possible moment at which they are capable of vesting. And as it appeared to him that if Mary, the eldest daughter, had had a son, and had died, leaving such son her survivor, such son would, without any doubt, have answered the description of first male heir of the branch of the family; and as in contemplation of law such son might be born at any time during her life, so this remainder could not possibly vest in interest under the event which had happened earlier than the death of Mary; but that upon the death of Mary such remainder must either vest or be entirely defeated, there being then no contingency for which it need wait (*z*). All these views, as well as the opinions on the construction of the words "of the branch of my uncle Richard's family," were maintained by learned arguments, in which all the authorities were discussed (I), and to which the real property lawyer will always resort, in order to ascertain the sense in which, in a will, the word "heir" is to be understood, or the construction to be given to the words first male heir of a

(*z*) 10 Bing. 235.

(I) An estate may be given to *A* for life, and the heirs of the body of his ancestor *B*, so as to execute an estate tail in whatever person comes within that description by being heir of *B*, and consequently that if *A* himself comes within it the estate tail shall be executed in him, "as if the gift be to the first son of *B* and the heirs of his body," and such was the principle in Mandeville's case, stated in Co. Litt. per Lord Brougham, 9 Cla. & Fin. 702. The example should be of a gift to the first son of *B*, and the heirs of the body of *B*. Mandeville's case is an example of a gift to a woman and the heirs of her late husband on her body begotten; she had a son and a daughter by her late husband, and she took only for life, and her son took an estate tail, and when he died without issue his sister took in tail as heir of the body of her father *per formam doni*; Co. Litt. 26, b. The case put in Co. Litt. 20, b., as holden by some opinions, is more singular: if there be grandfather, father, and son, and lands are given to the grandfather and to his heirs begotten by the father, the father dies, the grandfather dies, the son is in as heir to the grandfather, begotten upon the body of his father, and the wife of the grandfather in that case shall be endowed.

branch or line. A careful study of the case, although it may perplex the student, will amply repay his trouble.

7. In a case (*a*) in which the testator devised his Bedfordshire estate to trustees in fee to settle and convey it to George Rice for life, with remainder to *his issue in tail male in strict settlement*, upon condition that all persons to come into possession should, within a year afterwards, take the name and arms of Trevor, and also upon the like condition to that he had made in his will of his Sussex estate, so far as the change of circumstances would permit, that the said estate should go over to the party next entitled on the person for the time being possessed becoming entitled to the barony of Dynevor; and in default of such issue of George, he devised his Bedfordshire estate unto Henry Brand in fee, and the testator directed powers of leasing, jointuring, and charging of portions for younger children to be created for George, and powers of sale and exchange, &c. The Sussex estates had, by a separate will, been devised to Henry Brand for life, or until he should succeed to the barony of Dacre, and after his decease or succeeding to that barony, to his eldest son, Thomas, for life, or until he should succeed to the barony, with remainder to trustees to preserve, and after Thomas's decease or succeeding to the barony, to his first and other sons successively in tail male, remainder to Henry in fee, with a proviso that whenever any son of Thomas or his issue male should succeed to the barony, the estate of such person should shift, and with a proviso also to take the name and arms of Trevor. The barony of Dynevor was created by letters patent, and was limited to heirs male of the body of the first baron. The barony of Dacre was a barony by writ, and descendible to females as well as males. Sir L. Shadwell, V. C., held that under the devise of the Bedford estate to the issue in tail male, females might take, and that therefore the limitations should be to the first and other sons of George successively in tail male, remainder to all the

(*a*) Trevor *v.* Trevor, 1 H. of L. Cas. 239. Printed opinions of the Judges.

daughters of George as tenants in common in tail male, with cross remainders in tail male; and he overruled the claim of the eldest daughter to have the estate limited to the first and other daughters successively in tail male. He considered it plain that the estate to be taken was an estate in tail male, and that the persons to take were the issue: he thought that the language of Littleton proved that the words "in tail male" or "in fee-simple," or words of that description, did not describe the taker, but described only the estate which the taker was to have, and upon the words as they stood by themselves, it was clear to his mind that the testator meant that estates in tail male should be limited to those who were to take immediately in remainder after the tenant for life; and in confirmation of this view he referred to the will of the Sussex estates, where the testator used those very words in speaking of issue male; therefore if he had meant that the first issue of the first taker of the Bedfordshire estate should be the issue male, he (the Vice Chancellor) must suppose that he would have said so (*b*). Upon an appeal to the House of Lords, Wilde, C. J., delivered the opinion of the Judges in favour of the construction adopted by the Vice Chancellor; he said that the Judges were of opinion that the word "issue" was used in the present will in its ordinary sense, and comprised females as well as males, and that such meaning was not controlled or affected by the words "in tail male" which immediately followed the word "issue," or by any other part of the will. The words "issue in tail male" were a convenient and not incorrect form of expression to denote the first purchasers and the estate to be taken; the takers, by the word "issue;" the estate to be taken, by the words "in tail male." There was no reason against an estate "in tail male" being limited to a female, or an estate in tail female to a male, and the limitation of an estate tail of one kind or the other had no necessary effect in denoting the sex of the first taker, the effect

(*b*) 13 Sim. 108.

of the words of such limitation not being to describe the first taker, but simply to mark the course of descent from such first taker. If the word "issue" might be correctly construed as describing the first purchasers, and the words "in tail male" were a correct legal description of the estate to be taken by such purchasers, there should be found some very distinct and substantial reason for so construing the entire expression as to render it an incorrect form of devise. Therefore an estate in tail male might be limited to a daughter as well as to a son, and as daughters came within the description of issue, there seemed no good reason, according to the ordinary rules of construction, for deeming the devise ambiguous. In answer to the appellant's argument that the Sussex estates were devised to males only, the Judges' opinion was that it would be dangerous and lead to great uncertainty in construing a devise relating to one estate to infer an intention not expressed in it from the intention apparent in regard to a totally independent estate, and devised in terms altogether different; but they saw no ground for inferring an identity of intention on the part of the testator in regard to the two estates. Indeed as it appeared that the first will was distinctly, aptly, and correctly framed to effectuate the intention of limiting the Sussex estates to descendants through males only, the reference to the terms of that will appeared to the Judges to afford arguments rather opposed to the appellant's construction of the devise in question than in support of it. Finally the Judges relied upon the rule that, in construing wills, a departure from the ordinary meaning of the words contained in them should only be adopted from necessity, and in cases where the context or other parts of the will satisfactorily manifested that the language of the will had been used in some other than such ordinary sense. The House of Lords, upon the motion of Lord Brougham, and with the concurrence of Lord Lyndhurst, Lord Campell; and of Lord Cottenham, C., affirmed the decree. Lord Lyndhurst ob-

served that he agreed entirely with the Judges that it would be of very dangerous consequence if they were to introduce any circumstances out of the disposition of the Sussex estate for the purpose of governing the construction of this particular and distinct devise. He also concurred in the opinion which they had expressed, that if you referred to the devise of the Sussex estate, it did not tend to vary the opinion which he should have formed merely from the disposition of the estate which was then in question (*c*).

IV. Of Cross Remainders.

1. In Clayton *v.* Roe (*d*), cross remainders were raised between several classes of issue by a liberality of construction, which, however, unauthorized by the early authorities, must now be considered as the settled rule. The devise was of all the testator's real estate to his niece for life, remainder to a trustee in the usual way to preserve contingent remainders, remainder to her first and other sons successively in tail by regular words of limitation, and for default of such issue to her daughters as tenants in common in tail. "And for default of such issue, then to the issue of my four sisters in tail, in such manner as I have limited the same to my said niece's issue, and for default of such issue to remain to my own right heirs for ever." The niece and three of the sisters died without issue; the fourth sister also died, leaving issue a son and two daughters, who were living at the death of the testator, and the son afterwards died without issue. Their title to one-fourth was of course not disputed, but the contest was between the devisee of the testatator's heir at law, claiming the other three-fourths, and the two daughters of the testator's sister. The Court of King's Bench (*e*), upon the ground of the testator's intention to

(*c*) For the point decided on the shifting clause, see *infra*, s. 6, pl. 13; and for the point on the jointuring power, *infra*, Powers.

(*d*) 1 Dow, 384.

(*e*) Roe *v.* Clayton, 6 East, 628.

devise *all* his estate over in every instance, held, that it was perfectly clear that there would have been cross remainders amongst the daughters of the testator's niece. Then, as to the effect of the limitation to the issue of his four sisters in tail, in such manner as he had before limited the same to the issue of his niece, and for default of such issue to remain to his right heirs, they considered the devise to mean that all his estate should be enjoyed by the issue of his four sisters so long as there should be any such, and in default of such issue *all* to go over together to the testator's own right heirs. It was considered to make no difference whether the estate vested in the son and daughters of the sister jointly, or in the son in tail, remainder to his sisters in tail, as in either case, on his death, his sisters became entitled to the three-fourths of the estate in dispute. Cross remainders, therefore, were first raised between the daughters of the niece by implication; then between the four classes of issue of the sisters, and also, it should seem, between each class of issue as between themselves. In a case three years later in the Common Pleas, in which the same principle was followed, the above case does not appear to have been known to the bar or to the Court, except to Lawrence, J., who was a Judge of the Court of King's Bench when it was decided. He observed that, in Roe *v.* Clayton, the word respective, which Lord Hardwicke relied upon, was not introduced into the devise, but the Court determined that cross remainders were created principally because it was a devise of *all* the testator's estate. They collected from this, that it was the testator's design that it should all go over together (*f*). In a case before Lord Eldon four years after the decision in Roe *v.* Clayton, that case appears not to have been known to him or to the bar, and he thought the reasoning in some of the cases upon the expression of "all the premises," &c., was not satisfactory: undoubtedly the same intention may be collected without

(*f*) Doe *v.* Webb, 1 Taunt. 234.

those words (*g*). The case of Roe *v.* Clayton was carried by writ of error to the House of Lords, and there the judgment of the Court of King's Bench was affirmed, which settles the rule of law. It was insisted for the representative of the heir at law that the true construction of the will was to give the estate in quarters to the families of the four sisters, in like manner as the whole had been before given to the niece Sarah and her family, and that, therefore, when the takers of one quarter failed, that quarter went over. To establish the contrary it must be held, not only that cross remainders were limited as to the fractions of each quarter among the females who might take that quarter as tenants in common, but also that another set of cross remainders behind the former set was limited, as among the several takers of the several quarters, whereas no authority or principle of law had ever been carried to that extent. The daughters of the sister insisted that the cross remainders were well raised; and that if not, they were entitled to the whole, on the ground that under the devise a joint estate for life passed to all the children of the sisters as joint tenants, to which joint estate for life they, as survivors, were still entitled, with several inheritances in remainder to them respectively in tail. The House, according to its usual course, simply affirmed the judgment. But the case was expressly decided in the King's Bench upon the ground of cross remainders being raised by implication, and upon that ground alone the decision appears to rest. The true view of the operation of the devise, irrespective of the question upon the cross remainders, seems to be that put forward by the plaintiff in error, the appellant.

(*g*) Green *v.* Stephens, 17 Ves. 64; Myl. 636; Vanderplank *v.* King, and see Livesey *v.* Harding, Russ. & 3 Hare, 1.

V. Where estates are vested or contingent.

1. In Bromfield *v.* Crowder (*h*), after giving two life estates, the testator gave all his real estate to his godson if he should live to attain 21, but in case he died before he attained that age, and his brother should survive him, in that case he gave the same to his brother if he lived to attain the age of 21 years, but not otherwise: but in case both the above-mentioned boys died before either of them attained 21, then he gave his estate to another godson and his heirs for ever. The two life estates determined before the first devisee in fee attained 21, and the heir at law of the testator insisted that the remainders were all contingent, and had all failed. Upon a case sent to the Court of Common Pleas, they thought that the true sense of the thing was that the devisor meant him to take it as an immediate devise in himself, but that it was to go over in the event of his dying under 21. They considered the case to be governed by Edwards *v.* Hammond, 3 Lev. 132, 2 Show. 398. No doubt the general meaning of the word "if" implies a condition precedent, unless it be controlled by other words. But in this case there was a variance between the expression and the meaning, and the case of Edwards *v.* Hammond sanctioned them in giving effect to the latter. On these grounds they held that the grandson took a vested estate in fee. The words of condition, *if* he attained 21, were used only to denote the time when the estate should come into possession (*i*). The Master of the Rolls decreed according to the certificate, and the decree was, upon an appeal, affirmed by the Lord Chancellor, and afterwards, upon an appeal to the House of Lords, the appeal was dismissed and the decree affirmed (*j*). In this case

(*h*) 1 New Rep. 313; Joy *v.* Campbell, 3 Bligh, N.S. 114.

(*i*) See Roe *v.* Briggs, 16 East, 412.

(*j*) Printed Cases, D. P. 1815, MS. entry; Doe *v.* Moore, 14 East, 601; the same where the devise is immediate. See Farmer *v.* Francis, 2 Sim. & Stu. 505.

the words were difficult to manage, for not only were there clear words of condition precedent, but the gift over to the second grandson was not to take effect unless he survived his brother, the first devisee, and in that case the gift was to him if he lived to attain 21, but not otherwise. But the Courts struggled effectually to carry into effect the testator's intention.

2. This case was followed by that of Doe *v.* Nowell, in the King's Bench (*k*), where the devise was to the testator's nephew for life, and on his decease to and among his children lawfully begotten equally, at the age of 21, and their heirs, as tenants in common. But if only one child should live to attain such age, to him or her and his or her heirs, at his or her age of 21. And in case the nephew should die without lawful issue, or such lawful issue should die before 21, then to and amongst the testator's nephews and nieces there named, or such of them as should be then living, and their heirs and assigns for ever. The father, during the infancy of two of the children and before the birth of others, levied a fine and afterwards suffered a recovery, and conveyed the estate to a purchaser, and died leaving his children under age. It was held that the children took vested remainders, and they recovered against the purchaser: the case was concluded by Bromfield *v.* Crowder. Another ejectment on the same title was suspended until the case of Doe *v.* Nowell was decided. It then proceeded, and upon a special verdict the Court of King's Bench, without argument, gave judgment for the lessors of the plaintiff. Upon a writ of error in the House of Lords that judgment was affirmed (*l*) (I).

(*k*) 1 Mau. & Selw. 327.
(*l*) Randoll *v.* Doe, 1 Dow, 202; and see Rooke *v.* Denn, 4 Bligh, N. S. 1; 1 Dow, N. S. 437.

(I) In arguing Duffield *v.* Duffield, *infra*, the writer observed that he always thought Doe *v.* Nowell a more difficult case than the others of that class. The estate indeed opened, but it could not shift; there could be no

3. Intermediate between Bromfield and Crowder, and Doe *v.* Nowell, the case of Doe *v.* Moore (*m*) was decided in the King's Bench. The devise there was immediate, and not in remainder, when the devisee attained 21, with a gift over in case he should die before 21. The judgment was deferred till Bromfield and Crowder was disposed of, and then the devisee was held to take a vested estate.

4. This seemed to set the point at rest, and accordingly in Phipps *v.* Williams (*n*), where the testator devised an estate to trustees in fee, in trust to convey it unto his godson, when and so soon as he should attain 21, but in case his godson should depart this life before he attained 21, without leaving issue of his body, then the estate was to sink, and become part of the residue of his real estate, which he disposed of by his will; the Vice Chancellor, upon the foregoing authorities, held that the godson, although under 21, took an immediate vested interest in the estate, liable only to be divested, and that, consequently, he was entitled to the rents of the estate. From that decision there was an appeal to the House of Lords, where Lord Brougham thought that Lord Ellenborough's language in Doe *v.* Moore, in giving judgment, was very difficult to be reconciled with the other cases, as to the use of the word "when," and similar words. Here it was "when and so soon as," which he thought made some difference, but would rather make it appear to sound more like contingency than the word "when" alone; and the case stood over, in order that the judges might attend. Lord Ellenborough, I may observe, laid down the rule correctly as to real estate. He said that a devise to *A. when he attains* 21, to hold to him and his heirs, *and if he die under* 21, then over, does not make the devisee's attaining 21 a condition precedent to the vesting

(*m*) 14 East, 601. (*n*) 5 Sim. 44.

vesting or divesting. The devise was to all the children at 21. If two had died under 21, and two had lived to attain 21, could the shares of the two former have gone over? No; they must have descended to their heirs.

of the interest in him; but the dying under 21 is a condition subsequent, on which the estate is to be divested (*o*). Seven years afterwards the case was re-argued in the House of Lords, in the presence of eleven Judges (*p*), and the question proposed to them was as upon a legal devise to the godson, &c. and not, as in the will, to trustees. As might have been anticipated, they considered that they need not discuss whether the doctrine on which the cases rested was altogether satisfactory: it was sufficient to say that it clearly had been established and recognized as a settled rule of construction, not only in the courts below, but also in the House of Lords; and they were of opinion that the devisee took a vested estate in principle. Lord Lyndhurst, C., said that the object which the House had in view was that the Judges should review the cases of Doe *v.* Moore and Bromfield *v.* Crowder, and other cases of that class: he was perfectly satisfied with their opinion, and thought that the equitable estate must follow the legal rule. The Judges appear to have intended their observation to apply to the whole class of cases which we have been considering; but Lord Brougham supposed that they confined it to Doe *v.* Moore, and he said, had the question been new he should have held the decision in Doe *v.* Moore to be erroneous. It is manifest that the Judges did not review the authorities, in order to see whether they should follow them, but they consulted them in order to ascertain what had been decided, and of course held themselves bound by the authorities—not distinguishing Doe *v.* Moore from the rest of the class in which they included it—nor could they do otherwise, as the House of Lords had affirmed the decision in the case of Bromfield and Crowder, and also in Randall and Doe, which last case, however, was not referred to by the Judges. The decision of the Vice Chancellor was at length affirmed. There

(*o*) Phipps *v.* Ackers, 3 Cla. & Fin. 702.

(*p*) 9 Cla. & Fin. 583; 4 Mann. & Gran. 1107. See Bull *v.* Pritchard, 5 Hare, 567.

appears to have been no ground for impeaching his decision, for, independently of the rule which we have been considering, the gift was to the godson when he should attain 21, but the gift over was in case he should die before 21 without leaving issue of his body. This rendered it absolutely necessary that he should take an immediate vested fee, to enable him, if he should die under 21, leaving issue, to transmit the property to his issue. The issue could only take through him, and he must be seised of some estate which they could inherit (*q*). There was no pretence for the godson taking in tail; he took in fee (*r*).

5. The opinion of the Judges was not, perhaps, delivered with the usual exactness of the learned Chief Justice Tindal. He said the cases on this subject appear to be resolvable into two classes; first, those in which the courts have relied on the circumstance that the estate prior to the attainment of the age of 21, has been given to some third person either for the benefit of the devisee himself, as in Goodtitle *v.* Whitby, 1 Burr. 228, or for the benefit of some other persons, to endure during the minority, as in Boraston's case, 3 Rep. 16, and Manfield *v.* Dugard, 1 Eq. Ca. Abr. 195; and secondly, those cases in which the estates are given over in the event of the devisee dying under 21, as in Edwards *v.* Hammond, Bromfield *v.* Crowder, and Doe *v.* Moore. The first class proceeded on the ground that the estate given to the devisee on his attaining 21, is in fact only a remainder, taking effect in its natural order on the determination of the preceding estates (I). The second class went on the principle that the gift over, in the event of the devisee dying under 21, sufficiently showed the meaning of the testator to have been that the first devisee should take whatever the party claiming under the devise over was not entitled to, which of course gave

(*q*) See the argument, 5 Sim. 58. (*r*) See 9 Cla. & Fin. 589.

(I) Or the first interest being an exception out of the gift to the infant.

him the immediate interest, subject only to the chance of its being divested on a future contingency. It is manifest, therefore, that the Judges did not advert to the distinction *in the second class of cases*, so much relied upon in the House of Lords by one learned Lord, between immediate devises and devises in remainder. It might have been better had the two sorts of cases in the second class been distinguished, but no doubt the omission to distinguish them was occasioned by the opinion of the Judges, that *where there was a devise over* it was immaterial whether the devise was immediate or in remainder.

The Judges guarded themselves from saying what would be the legal effect of a simple devise to *A* and his heirs when or if he should attain 21, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining 21 as a condition precedent. In such a case Mr. Fearne might be right, that until the devisee attains the prescribed age he takes no interest whatever in the devised lands. This, we may observe, still appears to be the law (*s*).

5. A question of vested estate or contingency was raised upon another devise in the same will. The testator devised his real and personal estates to trustees to manage the estates, with power to sell any part of the real estate (except the part devised to the godson, which we have already considered) and to convey the fee, for building or other improvements, at rents and to exchange, and the monies to arise from the sale to be added to his personal estate. He gave his wife 3,000*l.* a year out of the personal estate, and he devised one of his estates to his godson, as above set forth, and the residue of his *personal* estate was, after payment of his debts, &c., and management and repair of his real and personal estate, to be accumulated until James Coops should arrive at the age of 24 years. Then upon trust to convey, assign, pay, and make over by proper conveyances, &c. unto

(*s*) See Grant's case, 10 Rep. 50, a.

him (upon his giving such security and executing such deeds and assurances, to the satisfaction of the trustees, or as their counsel should advise, for the regular payment of the several annuities by him bequeathed) all the legal estate and interest in all his real and personal estate and effects not thereinbefore given, devised, and bequeathed. He then provided a large income out of his personal estate for James Coops until 24, and he was to take the name of Ackers. But in case he should depart this life before he attained 24, without leaving issue lawfully begotten (*t*), the trustees were in like manner to assign, &c. (subject to his annuities) all his real and personal estate to the other branches of his family (*u*). The Vice Chancellor, who, as we have seen, decided that under the devise to the godson he took a vested estate, came to a contrary conclusion as to the above devise to James Coops; for in this case the mere attainment of the age was not the only thing by which the testator marked the time at which it should be determined whether the estate should vest, or finally become not liable to be divested, but there was a preliminary act to be done, without the doing of which James never would be entitled to call for the conveyance of the legal estate. That was in his opinion a condition precedent, and until that should be performed James took no interest; and his opinion therefore was, inasmuch as there was no trust for accumulation of the rents, that the rents of the residue of the real estate belonged to the heir in the meantime (*v*). Upon an appeal to the House of Lords, Lord Brougham could not allow that there was anything like a condition precedent, or indeed a condition subsequent either, to be found in the words, and the Vice Chancellor's order overruling the demurrer to the bill of the heir-at-law was reversed, and the demurrer allowed. This no doubt was correct, for the supposed condition was merely directory, and the devise over was subject to the

(*t*) Vide *supra*, p. 290.

(*u*) Ackers *v.* Phipps, 3 Cla. & Fin. 665; 9 Bligh, N. S. 430.

(*v*) 5 Sim. 63, 64.

annuities, which amounted to the same thing. But Lord Brougham appears to have been of opinion that the right in the devisee to the rents arose from the nature of the residuary devise, and not as a consequence of his taking a vested estate (*x*). According to one report (*y*), Lord Brougham was of opinion that James did not take a vested estate. He said, after stating the trust for accumulation, "In passing, I must say, that if anything turns on this, there is a great doubt whether G. H. Ackers (*z*), took under the devise a vested or contingent interest: if he had taken a vested interest, that would have made an end of the question; but then there are these words, 'to pay over when he shall attain that age,' and taking the two dispositions together, I have no doubt whatever, nor had his Honor, that this is a contingent devise." He concluded by stating his opinion that the gift to James Coops Ackers, though it was not vested, yet it was a gift that displaced the heir (*a*). Now it is true that the Vice Chancellor thought that this was a contingent devise, but that was upon a point overruled by Lord Brougham himself in the Lords, and yet the latter had no doubt whatever that this was a contingent devise. It appears to be impossible to support this opinion after the decision upon the devise to the godson. Remove the distinction taken by the Vice Chancellor, and both devisees would take vested estates, and so that learned judge would himself have determined.

6. We have already seen at what time a devise to the first male heir of a line would vest (*b*), and the subject of vesting will still arise under our next head.

7. In Potts *v.* Potts (*c*), chattels were held under the words of the will not to vest absolutely in a tenant in tail of

(*x*) Vide *infra*.

(*y*) 3 Cla. & Fin. 687.

(*z*) This must be a misprint for J. C. Ackers.

(*a*) 3 Cla. & Fin. 701; and see a passage to the like effect in the judgment in Phipps *v.* Ackers, 3 Cla. & Fin. 716.

(*b*) Vide *supra*, p. 278.

(*c*) Ch. Ireland, 27 April 1846, now reported 3 Jo. & Lat. 353.

real estate, who did not live to come into possession, but were held to vest under words of contingency in a tenant in tail in possession. The testator gave certain *real* estates to his nephew, James David, for life, with remainder to trustees to preserve contingent remainders, remainder to his first and other sons successively in tail male, with *like remainders* for life successively to his other nephews, John, William, and Benjamin, and in tail male to their sons successively by apt words of limitation, with the ultimate remainder to the daughters of a brother as tenants in common in fee; and the testator bequeathed to trustees certain chattels and his interest in a newspaper, in trust to suffer his nephew, James David, to receive the profits for his life, and after his decease to suffer each and every of the several other persons aforesaid, to whom an estate for life in his real estates was thereinbefore limited successively, and as each of them should become seised of his real estates under the aforesaid limitations thereof, to take the profits for his and their life and lives respectively; and after the decease of the said last-mentioned tenants for life as should become seised in manner aforesaid, or if none of them should become so seised, then, after the decease of the said James David, upon trust to assign the chattels, &c. to such person or persons as should then become seised of the said real estates under any of the limitations aforesaid, their executors, administrators, or assigns. By a codicil the testator made his nephew, William, his residuary legatee. James David had a son born in the testator's lifetime, who died in his father's lifetime, and without issue; then James David, the father, died: the person claiming under this son insisted that the chattels vested in him absolutely. A son of James David's second son became tenant in tail of the real estates, and he claimed the chattels absolutely; whereas William insisted that whilst any tenant for life in remainder was *in esse*, and the real estates might vest in him in possession, there was an intestacy as to the chattels, and that the

interim interest undisposed of fell into the residue. Sir E. Sugden, C.—after deciding that although the deceased son of James David took a vested estate tail in remainder in the real estate, yet he did not take the chattels absolutely; and that although William might yet become entitled to a life estate in possession of the real estates, yet there was no intestacy as to the chattels—observed, that it could not be disputed that no person could take the chattels who was not entitled to the real estates, but there was no general declaration in the will that the chattels should go along with, and be held by, the persons entitled to the real estates. He then proceeded to consider what the testator's intention really was, and how far he was at liberty to effectuate that intention. The real estate was limited by apt words in strict settlement; the testator meant his nephews, in the order named, and their issue male after them, to take. It was not disputed that he meant the nephews in like manner to take the chattels. What then was his intention as to their issue? That he meant the real estate and chattels to go together to a certain extent could not be doubted. The framer of the will knew perfectly well that under a general gift by reference to the limitations of his real estate, the first tenant in tail, although he lived but a day, would become entitled absolutely to the chattels, and therefore he did not adopt words similar to those upon which Foley *v.* Burnell, and other cases depended. To him it was clear that the testator intended, as near as might be, to limit the real estate and chattels together, but he did not intend the latter to vest in a tenant in tail, who never lived to acquire the possession. There was but one gift of the absolute interest. The will was so framed as to give to all the tenants for life of the real estates precisely similar interests in the chattels, and then, upon the alternative, to give the chattels absolutely to the person entitled to the real estate. He was clearly of opinion that the ultimate gift was contingent. He did not rely upon the word "then," referring to the decease

of the tenant for life, but to the word "then" in the body of the gift, and forming part of it: the trust was to convey (which act is a single one) to such person or persons as should then become seised of the estates. The person entitled must answer the description—he is to be the person then entitled. The real question was, what was the period referred to. If the testator, after giving the real chattels to James David for life, had added *this* gift after his death, it would, in the event which had happened, be a direction to convey to the plaintiff [the tenant in tail of the real estates in possession], for the word "then" would apply to the death of James when the plaintiff became seised of the estate. It was indeed argued that he did not then become seised, as the real estate was vested in him in his father's lifetime; but although his seisin was a continued one, his estate was changed from a remainder to an estate in possession, and he was the person within the contemplation of the testator. This construction would exclude the right of the son, who had died without issue in his father's lifetime. The plaintiff was then tenant in tail in possession of the real estates. He thought it clear that the framer of the will meant to exclude a son who died in his father's lifetime, and only to give the chattels absolutely to the person who after the death of the tenant for life should first become entitled to an estate tail in the real estates in possession. It was this intention to make but one single gift by the direction to convey which embarrassed the conveyancer, and led him, after an express separate trust of the chattels to James David for life, to introduce trusts for all the other tenants for life before the direction to convey. But they were only to take as each should become seised of the real estates under the limitations. The direction to convey was in the alternative: either after the death of the last life as should become seised, as aforesaid, or if none of them should so become seised then after the death of James David, to convey to such per-

son as should then become seised of the said estates. Now, he could not imply what was not expressed and clearly was not intended, that the conveyance in the latter event, viz., the death of James David, meant only in case his brothers should die in his lifetime. The true construction was, that if James David's issue failed, John was to take for life, and so as to William; but that if at James David's death there was a person then seised of the estates (not being a tenant for life), the chattels should be assigned to him absolutely. The provision in like manner would apply to the issue of either of the other brothers. But it could apply to one only, and in this case the event had happened upon which the trust was to be exercised. In the gifts to the other tenants for life after the death of James David, the first tenant for life, it was in effect expressed that they were only to take in default of male issue of James David, and so successively of each preceding tenant for life. If they were not to take in preference to the issue of a previous tenant for life, the trust would naturally arise when at the death of a tenant for life there was first a tenant in tail in possession, and the words were sufficient to carry that view into effect. This construction gave effect to every word in the will according to its natural meaning; it did violence to none. It put a rational construction upon the devise to the successive tenants for life which was somewhat ambiguous. The conveyancer aimed at including in one clause several successive estates to be introduced upon different events, just as in later times in wills a single devise was sometimes made to trustees to preserve all the contingent remainders, to take effect after every life estate. As Lord Hardwicke observed, there is no magic in words, and it was immaterial which clause came first and which last in a will. This construction, too, conformed as near as might be to the usual mode of uniting chattels with real estates, and whilst it prevented, in accordance with the clear terms of the will, the chattels from vesting absolutely in a tenant in tail who

died in his father's lifetime, it had the merit of vesting the chattels absolutely in the person who was then tenant in tail in possession of the real estates—an union which the testator intended—whilst the construction of the claimant under the deceased son would sever the two estates and vest the chattels in a stranger, and the construction of William would for a time defeat every intended legatee of the chattels in favour of a residuary legatee. The claim of one of the opponents of the plaintiff would the moment after the testator's death vest the chattels in one who did not live to come into possession and at once destroy all the gifts over, contrary to the clear expressions of the will, whilst the claim of the other would not simply give to the residuary legatee an interest intended for the specific legatees, but would take from an actual tenant in tail in possession of the freehold estates all present right to the chattels, and might carry the ultimate right to the chattels to a child who could have no higher right to the freeholds under the will, but must claim under the second or third tenant for life, thus postponing and probably defeating the right of a son of the first tenant for life living to become tenant in tail in possession of the real estates in favour of a son of a subsequent tenant for life who might live to acquire a like estate. The claim of the plaintiff happily escaped both these extremes, and in giving effect to it he executed the testator's plain intent and violated no rule of law.

8. Upon an appeal to the House of Lords, at the close of the argument, Lord Cottenham, C., moved the affirmance of the decree with costs, in which Lord Campbell concurred; and so it was decreed (*d*) (I).

(*d*) 29 June 1848, Printed Cases, D. P. MS.

(I) The case of the Duke of Newcastle *v.* Lady Lincoln, 3 Ves. 387, arose upon a covenant in a marriage settlement. Certain real estates were conveyed in strict settlement to the father for life, then to the son for life, with remainder to the first and other sons of his marriage in tail male, remainder over in strict settlement; and the father covenanted to assign a leasehold estate to trustees, in trust for such person and persons, and for such and the

9. Where a testator devised to his wife for her life only all his remaining estates and some other properties, and also left her his capital in trade for her life, but in trust at her death for his *then surviving* children, share and share alike, independent of the rental of his said estates, which he bequeathed to his *surviving* female children, the rents to be paid to them, but to have no power to encumber. On the decease of any of these children, should they die without issue, that share to fall to the rest, and so on to the last female child, but should they marry and have children, then their share to go to the said child or children, and from the last female child to the males of his body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them (*e*); it was held at the Rolls, afterwards by the Lord Chancellor, and ultimately by the House of Lords, that the words then surviving and surviving in the same clause had the same meaning, and that therefore a daughter who died in the lifetime of the widow took no share, although she married and left issue, and that

(*e*) Wordsworth *v.* Wood, 1 H. of L. Cas. 129; 2 Beav. 25; 4 Myl. & Cra. 641.

like estate and estates, and for such or the like ends, intents, and purposes, as were thereinbefore mentioned of the real estates, as far as the law in that case would allow and permit. Lord Rosslyn held that the settlement to be made of the leaseholds was to be analogous to that of the freehold, so that no child born, and not attaining 21, should by his birth attain a vested interest to transmit it to his representatives, and thereby defeat the ulterior objects of the articles. This he afterwards explained to be that no person should be entitled to the absolute property unless he should attain 21, or die under that age leaving issue male, and this was the decree; 12 Ves. 218. The first tenant in tail attained 21, and upon an appeal to the House of Lords the decree was affirmed, confining the decree to the right of the tenant in tail, it being unnecessary, from the circumstance of his having attained 21, to decide anything touching the part of the decree which established the gifts over in case of his death under 21, and without issue male. This removed Lord Eldon's difficulty as to what was to become of the estate if the party died under 21 leaving issue, and did not amount to a decision that the Court would modify the trusts according to the original decree. See 14 Ves. 485; 15 Ves. 553.

as she took no interest the gifts over to her issue failed also.

VI. Of executory devises, and shifting uses.

1. Where one of a class who is to answer a given description, is to take at a future time, without any preceding estate, the devise is an executory one, and the estate cannot be held to vest and divest from one to another, as it might have been made to do by apt words of gift, with provisions for the estate to shift from time to time.

2. This was decided in the great case of Duffield *v.* Duffield, which Lord Eldon hoped would be a leading case (*f*). There were two devises: 1. A devise of an estate to trustees in fee, in case there should be one son of his daughter, by her present husband, who should attain 21, upon trust for such son, his heirs and assigns for ever. And in case there should be two or more sons of his daughter who should attain 21, then in trust for the second of such sons, his heirs and assigns for ever. And in case there should be no son of his daughter, by her husband, who should attain 21, upon trust for such of the daughters, if any, of the daughter by her husband, as should first attain 21, or be married under that age, with the consent of the trustees or trustee of his will, and the heirs and assigns of such daughter for ever, with certain gifts over, if no son should attain 21, or daughter attain that age, or marry under that age with consent. 2. A devise of the residuary estates to the trustees in fee (*g*). And the testator directed and appointed that the son lawfully begotten of his daughter who should first attain 21, should, on attaining such age, change his name to that of Elwes; and he gave and devised to the said son of his daughter aforesaid, on his attaining the age of 21 years, and changing his name to Elwes, certain freehold property, to hold to him, his said grandson, his heirs

(*f*) 1 Dow, N. S. 268, 305; 3 Bligh, N. S. 260.

(*g*) This is the devise in the will.

and assigns for ever (*h*). And the testator provided maintenance for any child or children of his daughter who should be presumptively entitled; and he authorized his trustees, during the minority of such child as by virtue of the limitations should be presumptively entitled to the estates first devised, to lease them (*i*). Upon a bill filed, the Vice Chancellor sent a case to the Court of King's Bench, and the Judges of that Court certified their opinion that the estates given by the codicil passed to the first son of the testator's daughter who should attain 21 years, and change his name to Elwes, and in effect they gave a like opinion on the first devise (*j*). Sir John Leach, V. C., however, decreed that, under the first devise, the only son at the death of the testator took a vested interest, subject to be divested by his death before 21, or by the birth of another son. Another son had been since born, and the estate of the only son at the death, he said, was now divested, subject however, to be revested, if no other son should attain 21. He considered the present case to be in effect decided by Bromfield *v.* Crowder, and that class of cases. As to the second devise, the Vice Chancellor observed that if the devise had been to the son of the daughter who should first attain 21, without more, there could be no question that the only son would take a vested interest, subject to be divested by his death before 21 (I); and he was of opinion that the additional words as to changing his name made no difference. If words of condition, they were necessarily words of condition subsequent; but there being no devise over, they were rather to be considered as words of recommendation (I).

3. This was so manifestly erroneous, that upon the learned Judge mentioning to one of the counsel in the cause in

(*h*) This is the devise in the codicil.
(*i*) These provisions are in the will.
(*j*) Duffield *v.* Elwes, 2 Sim. & Stu. 544; 3 Barn. & Cress. 705.

(I) See before, p. 291.

his place at the bar what decree he meant to make, the latter earnestly pressed him to reconsider the case, as no such shifting uses had ever been created by the law under a general description of the person to take. The decree reserved the question, as to the second devise, how far the estate declared to be vested in the son might be affected in case he should not, on attaining 21, change his name for that of Elwes: thus reserving the question upon which the right to the estate depended. The estate therefore which passed under the second devise was given to a person who did not and never might answer the description: if he attained 21 he might decline to take the name of Elwes; nor did it follow that because he was the eldest son he would first attain 21. The estate which passed under the first devise was taken from the eldest son and given to the second, yet none could tell that there would be more than one son who would attain 21, and that that one might not be the eldest; so that the estate was first vested in a son who did not answer the description, and then taken from him and vested in another son, although the latter did not and never might answer the description, and that son was in his turn to be divested of the estate in the event of his dying or becoming neither the second nor only son before he attained 21, which might revest the estate in the first son, from whom it had already been taken. Such vesting of estates and shifting of them afterwards, without any provision in the will to authorize it, had never before been heard of (*k*). Upon an appeal to the House of Lords, after a full and elaborate argument in the presence of the Judges (I), they were of opinion that the estates comprized in the first devise did not vest until a second or only son attained 21,

(*k*) See Wills v. Wills, 1 Dru. & War. 451.

(I) The first questions put to the Judges did not enable them to answer all the points; new questions were therefore put to them. See 1 Dow, 395; 3 Bligh, 340.

or in case of failure of male issue, until a daughter attained 21, or married with the consent of the trustees. And that the estates in the second devise did not vest until some son of the testator's daughter should attain 21, and take the name of Elwes; and upon this opinion the House of Lords acted by reversing the decree of the Vice Chancellor in these respects, and making declarations according to the opinion of the Judges, in which Lord Eldon and the Lord Chancellor concurred.

4. In the case of Scarisbrick *v.* Eccleston (*l*), the words "younger son or daughter," in a shifting clause in a will, were construed to mean "younger son or younger daughter." It was insisted that younger meant posterior in limitation, but that not being the natural construction of the word, it was held that if the natural construction was to be departed from, that construction which best supports the apparently primary intention of the testator ought to prevail, provided it be consistent with the rules allowed by law. And the words in favour of the intention that the estates should shift only from sons to sons, and from daughters to daughters, were construed distributively with reference to the persons from whom the estate was to shift, as "a son younger than a son, or a daughter younger than a daughter, from whom the estate is to shift."

5. The testator had three sons and four daughters, born in the following order: 1, Thomas; 2, Ann; 3, Mary; 4, Elizabeth; 5, Catherine; 6, William; 7, Charles; and he had three estates, called severally Scarisbrick, Wrightington, and Eccleston, which he devised as follows:

(*l*) 5 Cla. & Fin. 398.

1. Scarisbrick.	2. Wrightington.	3. Eccleston.
1. Thomas for life; remainder	*In like manner*; but,	*In like manner*; but,
To his sons successively in tail male; remainder	1. To William and his sons; remainder	1. Charles and his sons; remainder
2. William for life; remainder	2. Charles and his sons; remainder	2. Thomas and his sons; remainder
To his sons successively in tail male; remainder	3. Thomas and his *second* and other sons in tail male, and then to his *first* or only son in tail; remainder	3. William and his sons; remainder
3. Charles for life; remainder	To testator's sons' sons successively in tail; remainder	To testator's sons' sons in tail; remainder
To his sons successively in tail male; remainder	To the sons' daughters successively in tail; remainder	To the sons' daughters successively in tail; remainder
To testator's sons' sons successively in tail; remainder	4. Testator's *second*, third, and fourth, and subsequently born daughters successively for life, and her respective sons and daughters, as in No. 1; remainder	4. To third and fourth daughters, Elizabeth and Catherine, and subsequently born daughters, successively for life, and her respective sons and daughters, as in No. 1; remainder
To the sons' daughters successively in tail; remainder	5. Ann for life, and her sons and daughters, as in No. 1.	5. To first and second daughters, Ann and Mary, for life, successively, and her respective sons and daughters, as in No. 1.
4. Ann for life; remainder		
To her sons successively in tail male, and then in tail; remainder		
To her daughters in tail, with cross-remainders.		
5. With like remainders to each of the testator's other daughters successively in the order of their birth, and their respective issue.		

There were two shifting clauses; one, as to the Wrightington estate, that if William and Charles, or any subsequently born sons, or Mary, Elizabeth, and Catherine, or any subsequently born daughter, or any issue of the respective bodies of any of the sons or daughters, should become entitled to the possession of Scarisbrick, and any younger

son or daughter, or any issue of such younger son or daughter, should be then living, then the uses limited in the Wrightington estate to the child who or whose issue should so become entitled should cease, but that estate was to return to the old uses if there should afterwards be a failure of issue of all his sons or daughters who should be younger than the son or daughter from whom or from whose issue the same should have so shifted as aforesaid. 2. As to the Eccleston estate, that if Charles, or any subsequently born son, or Elizabeth and Catherine, or any subsequently born daughter, or any issue male of the respective bodies of any of the sons or daughters should become entitled to the possession of Wrightington, and any younger son or daughter of testator's, or any issue of such younger son or daughter, should be then living, then the uses limited in the Eccleston estate to the son or daughter who or whose issue should so become entitled should cease; but that estate was to return to the old uses if there should afterwards be a failure of all his sons or daughters who should be younger than the son or daughter from whom the same should have so shifted as aforesaid. The Scarisbrick estate was charged with an annuity of 1,000*l.* (in addition to 600*l.* per annum before charged for her upon it) for his wife, in case all the sons of the testator save one should die without issue. There were clauses for taking the names and arms, which were complied with. William, the second son, died in the testator's lifetime, without issue. Thomas enjoyed both the Scarisbrick and the Eccleston estates during his life, it having been decided in the Duchy Court of Lancaster, that, in consequence of William's death without issue in his father's lifetime, the estates limited to Charles and his issue in the Eccleston estate never took effect. Thomas was thus treated as younger *in limitation* to Charles. The Judges in the House of Lords intimated that they were inclined to think this view erroneous (*m*); it would undoubtedly be difficult to support it.

(*m*) See 5 Cla. & Fin. 450.

Thomas afterwards died without issue, and Charles claimed to be entitled to *all* the three estates for life. His title to the Scarisbrick estate was, of course, not disputed. Upon a bill filed, Sir John Leach, Master of the Rolls, held clearly that the language of the testator, in its plain and ordinary sense, gave the Wrightington estate to the daughter Mary, who was next in remainder, and such he considered to have been the testator's intention. As to the Eccleston estate he thought the decree of the Duchy Court of Lancaster a proper one, although it was a decree against the express words, for the words younger son there meant the person next in order of limitation, and he held that that estate vested in Elizabeth, the next in remainder (*n*). This decree was affirmed upon appeal by Lord Lyndhurst, C., but upon an appeal to the House of Lords both decrees were reversed, upon the unanimous opinion of the Judges, supported by Lord Brougham, C., and with the concurrence of Lord Lyndhurst. The Judges thought that there were circumstances in the disposition to the daughters from which it might be inferred that the testator did not contemplate the devolution of an estate to any one of them so long as there was a son or issue of any son living. If the testator did not contemplate any estate coming to his daughters till after the issue of his sons was extinct, the provision, as it stood, was sensible and consistent, for upon failure of issue of the sons, Scarisbrick would go to Ann, and Wrightington to Mary. Mary might afterwards succeed to Scarisbrick, and then by the provision, as it stands, Wrightington would shift to Elizabeth. Thus the issue male and female of the sons would be preferred to the daughters and their issue. As long as any issue of more sons than one remained, Scarisbrick and Wrightington would be kept distinct, and upon failure of issue of all the sons the three estates would devolve separately upon the daughters. They held that the intention was that the estates were only to shift from sons to sons and

(*n*) 5 Cla. & Fin. 423, n.

from daughters to daughters. The words of the shifting clauses could not apply to any of the daughters, all of whom were older than Charles; none of them, therefore, could be intended as persons to whom the estate could shift from Charles; and they construed the words "younger son or daughter" in the sense already pointed out. Mr. Justice Park, in delivering the opinion of the Judges, observed that the object of constituting three families was purposely departed from in case of the two younger sons dying without issue, and the eldest surviving or leaving issue surviving them (*o*). Now this really was the key to the intention. What the testator expressly provided for his eldest son, by ordinary limitations, he intended equally for his other sons, if they lived to take the place of his eldest son, although as this could only be accomplished, consistently with his other object, to keep the estates distinct as long as he could by shifting clauses, he had failed to express his intention in language free from ambiguity. The House of Lords, however, with the assistance of the Judges, effectuated his intention without doing violence to his language. The case well deserves the student's attentive consideration (*p*).

6. Since the above statement was written, the proceedings on the decree of the Duchy Court have been published (*q*). That decree was reversed by the Chancellor of the Duchy, assisted by Mr. Justice Maule and Mr. Baron Rolfe, and an elaborate judgment was delivered by the former (*r*), and that decree was affirmed by the House of Lords, with the concurrence of Lord Cottenham, C., and Lord Brougham.

(*o*) See 5 Cla. & Fin. 446.

(*p*) The writer twice narrowly escaped having to argue this case. On the original hearing his brief was withdrawn by consent of both parties, the one alleging that by arrangement the other was not to have his aid as counsel. His brief on the appeal was returned by him when he first went to Ireland. However reads attentively the arguments of Messrs. Tinney and Duckworth (who had the assistance of Mr. Duval, whose loss we lament), will be of opinion that the appellant required the aid of no other counsel.

(*q*) Wilbraham *v.* Scarisbrick, 1 H. L. Cas. 167.

(*r*) 1 H. L. Cas. 173, n.

7. A reference to the former statement will enable the reader to understand the question between Thomas, who claimed the Eccleston estate, against Charles, who, in consequence of William's death without issue in the testator's lifetime, had taken the Wrightington estate; but it is now necessary to state, in order that this point may be fully understood, that the testator devised the Eccleston estate to trustees, to raise, by sale or mortgage, sufficient to pay his debts and legacies, and provisions for his subsequently-born sons, and for his daughters. And in case the residue of these estates should not exceed the value of 15,000 *l.* the trustees were to stand seised in trust for Charles, or any subsequently-born son first attaining 21, his heirs, &c., respectively for ever. And in case he should leave only two sons, in trust for the eldest of them, his heirs, &c. But if such residue should [as it did] exceed the value of 15,000 *l.* the testator directed that the estate should go to the uses before stated in the third column. The order of the Vice Chancellor of the Duchy declared that the estates given by the will to Charles and his issue in the residue of the Eccleston estate never took effect, and that Thomas, in the events which happened, became entitled to the same for his life. It will be seen that in the events which had happened there was no son living younger than William, or any issue of such a younger son. The learned assessors of the Chancellor of the Duchy observed that to give effect to the shifting clause two events were to concur: the first had happened, as Charles had become entitled to the Wrightington estate. The question was, whether the second event had also happened; that is, whether there was *in esse* at the death of the testator any son of the testator "younger" than Charles, according to the meaning of the word *younger*, as used in the Eccleston shifting clause. The Vice Chancellor held that although there was no younger son, properly so called, yet as Thomas, though an eldest son in point of age, was as to the Eccleston estate subsequent in limitation to Charles,

he was a younger son within the meaning of the shifting clause. But they did not concur in that construction; they thought that the words were here to be construed according to their plain natural import. Construing the word younger in the Eccleston shifting clause to mean younger in point of age, according to its natural import, that clause was still quite sufficient to carry out the testator's leading intention of founding three families, so long as any three sons, or the issue male of any three sons, should be in existence. In the events which had happened it became impossible to found more than two families, and the limitations, with the Wrightington shifting clause, were well adapted for that purpose, securing the Scarisbrick estate to the principal branch and the Wrightington estate to the other, now become the second branch. The third estate, originally destined to support a distinct line, the carrying out of which original destination had become impossible, was, in their opinion, to remain with the younger son, to whom it was originally given. They relied on the literal meaning of the words, and thought that the word younger might have been used intentionally to exclude Thomas, and to confine him to the Scarisbrick estate; or, which was the more probable supposition, the case which had occurred might not have presented itself to the mind of the testator. In either of those cases it would be manifestly unjust to construe the language in any other than its natural sense: in the former case, because such a course would actually defeat the intention, although expressed in unambiguous language; and in the latter, because the Court would be altering the plain meaning of the words, in order to fix on the testator a meaning which, according to the hypothesis, he never entertained. They showed that the gift of the Eccleston estate, if under the value of 15,000*l.*, could not be relied upon in favour of the Vice Chancellor's decision, by pointing out how that estate would, if of no greater value, have gone in the different events which might have happened. They said that in

speaking of children the word younger, unless controlled by the context, or by circumstances, was plainly used in its direct, and not in any figurative sense. But there did not appear to them either in the nature of the provisions or the presumable intention of the testator, or in the context of the will, anything which could justify them in saying that the word "younger" in the Eccleston shifting clause meant anything else than younger in point of age. Wilde, C. J., declared in the House of Lords that the Judges entirely concurred in the judgment given in the court below.

8. In Trevor *v.* Trevor, the question depended upon a clause which referred to a shifting clause in a devise of another estate (*s*). The Sussex estate was devised by a separate will to Henry Brand for life, or until he should succeed to the barony of Dacre [which was a barony in fee] then enjoyed by his brother, Thomas Lord Dacre, and after his decease, or his succeeding to the barony of Dacre, to Thomas, the eldest son of Henry, for life, or until he should succeed to the barony; and after the determination of the estate of Thomas in his lifetime by any other means than his succession to the barony, to trustees during his life, or until he should succeed to the barony, upon trust to preserve contingent remainders, and in default of such issue to Henry in fee, provided that when any son of Thomas Brand should succeed to the barony, the estate of the person so succeeding thereto (*provided that there should then be in existence any other son, or issue male of any other son of Thomas*) should determine in like manner as if the son of Thomas, who, or whose issue male, should so succeed to the barony, were not only dead, but as if there was also an extinction of male issue of such son of Thomas, and thereupon the estate should go on to the next or other son of Thomas, or his issue male, to be entitled under the devises aforesaid; provided that every person who, under the devises aforesaid, might come into the possession of the estates, should, within one year

(*s*) 13 Sim. 108; 1 H. L. Cas. 239, *supra*, s. 3, Div. III. pl. 7.

afterwards, by proper means, take and bear the surname and arms of Trevor; and that in case any such person should, for the space of one year, neglect or refuse to take and bear such name and arms, or should afterwards discontinue to use the same, then the estate of such person should cease, if a tenant for life, as if he were dead; and if a tenant in tail, as if he were dead and there were an extinction of his issue male, or of the issue male of the ancestor through whom he acquired his estate tail, and thereupon the estate should go over to the person entitled under the gifts aforesaid, as if such event or events had actually happened.

9. The Bedfordshire estate, upon which the question turned, was devised by a will, dated two days later, to trustees to convey it to George Rice, son of Lord Dynevor, for life, with remainder to his issue in tail male in strict settlement, upon condition that all person or persons from time to time to come into possession of the said estate, should, within one year afterwards, take the name and bear the arms of Trevor (l); and also upon the like condition to that he had made in his will of his Sussex estate, so far as the change of circumstances would permit, that the said estate should go over to the party next entitled, or the person for the time being possessed becoming entitled to the barony of Dynevor [which was limited to the heirs male of the first baron], and in default of such issue of George, he devised the Bedfordshire estate to Henry Brand in fee. The Vice Chancellor held that George Rice had no claim to be

(l) The Vice Chancellor said that his notion was that this condition had no reference to the Sussex estate, and therefore was not to be construed with reference to the Sussex estate. Where the testator did mean to refer to the limitations of the Sussex estate, he had done so in express terms in the next proviso. Therefore he did not see why this clause should be so expressed as to produce the effect of making to cease the estate of a person who happens only to be a brother or collateral relation of the offending party, 13 Sim. 150. From this part of his decree there was no appeal; see the reporter's note, p. 152. I do not remember any instance in which the *estate tail* then vested in the person neglecting to do the act was partially defeated: it will be found difficult to frame a clause consistently with the order and the rules of law.

omitted from the shifting clause, relying upon the condition added to the devise to him for life, and afterwards to his issue in tail male. The very form of limitation which the testator had adopted with regard to his Sussex estate was tantamount to a condition, for it was in effect a limitation to Henry Brand for life, upon condition that if he succeeded to the barony of Dacre, his life estate should cease, and the estates should go to his son Thomas for life, but subject to the like condition. It was more shortly expressed, but it was equally a conditional limitation. It was the plain intention of the testator that no taker of his Bedfordshire estate should hold that estate and the barony of Dynevor together, and therefore the precedent furnished by the will ought to be followed, and the estate be limited to George for life, or until he become baron of Dynevor, and then the shifting clause, like the shifting clause in the will of the Sussex estate, need not include the tenant for life. The next question was, whether the words in a parenthesis in the proviso as to the Sussex estate should be introduced into the shifting clause of the Bedfordshire estate, although no such words were contained in the devise of that estate. The Vice Chancellor said that it seemed to him that the testator had expressly provided that there should not be a disunion of the Sussex estate from the barony of Dacre, unless in the event of there being some other person capable of inheriting that estate in tail male after the barony had descended upon the person in possession, in order that the descent of the barony of Dacre should not have the effect of accelerating to Henry Brand the remainder in fee, but that in the event of there being no other male issue capable of taking the estate after the barony had descended, the barony and the estate might go together as far as they could. He apprehended that the testator meant the same thing to take place with respect to the Bedfordshire estate, namely, that in the event of the barony of Dynevor descending to a son of George Rice, or the issue male of a son, he should con-

tinue to hold the Bedfordshire estate, unless there were some person capable, under the limitations previously expressed in the instrument, of taking that estate in the way of taking it in remainder; in order to prevent the acceleration of the fee in possession to Henry Brand. In the House of Lords the question upon which the opinion of the Judges was asked was simply the meaning of the devise to the issue in tail male. Lord Lyndhurst observed that there were two or three other exceptions which had been raised in the case; but the only doubt which could possibly arise related to the point on the devise to the issue. Therefore being of opinion that the judgment on that point was right, he advised the House generally to affirm the judgment of the Vice Chancellor, and he had authority to state that that was the opinion of the Lord Chancellor, who was prevented from being there; and the decree was accordingly affirmed.

10. Until the case of Beard *v.* Westcott (*t*) no distinct opinion had ever been delivered by any Judge that, in the creation of executory devises, the term of 21 years after lives in being could be taken as a term in gross; but in that case the Judges of the Court of Common Pleas certified their opinion that the executory devises in that case were not affected by the circumstance that they were to take effect at the end of an absolute term of 21 years after a life in being at the death of the testator, without reference to the infancy of the person intended to take (*u*). However, the certificate was equally clear in favour of the limitation over, on another important point; but upon that point the Court of King's Bench disagreed with the certificate, and the case was ultimately decided against the validity of the limitation

(*t*) 5 Taunt. 393; Sugd. n.; Gilb. Uses, 260.

(*u*) The case was sent back to the Common Pleas (see 5 Taunt. 407), after argument at the Rolls by Romilly and Hayes for the former certificate, and Sugden against it. The Judges of the Common Pleas refused to rehear the case unless some point was stated, and thereupon the writer framed the question as it now appears in the report.

upon the opinion of the Court of King's Bench (*x*). This left the point on the executory devise open for further consideration. In the case of Bengough *v.* Edridge (*y*), afterwards heard in the House of Lords as Cadell *v.* Palmer (*z*); the point arose, and the Vice Chancellor, Sir John Leach, after an elaborate argument at the Bar, gave judgment in a few words, upon the rising of the Court for the long vacation, stating that, although the rule of law was framed by analogy to the case of a strict settlement, where the 21 years was allowed, in respect of the infancy of the tenant in tail, yet he considered it to be fully settled that limitations by way of devise or springing use might be made to depend upon an absolute term of 21 years after lives in being. This was not considered a satisfactory mode of disposing of such an important case, and accordingly it was carried by appeal to the House of Lords. All the Judges of England attended, and the case was fully argued. Mr. Justice Bayley delivered their unanimous opinion, with the reasons at large, that the limit was a life or lives in being, and 21 years afterwards, without reference to the infancy of any person whatsoever. Upon two further questions put to them by the House, although the points did not arise in the case before the House, whether a limitation by way of executory devise was void, as too remote, if it was not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of 21 years, *together with the number of months equal to the ordinary or longest period of gestation*, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person born or in *ventre sa mère*, the unanimous opinion of the Judges was that such a limitation would be void as too remote. They considered 21 years as the limit, and the period of gestation to be allowed in those cases only in which gestation exists. The House of Lords,

(*x*) Turn. & Russ. 25; 5 Barn. & Ald. 801.

(*y*) 1 Sim. 173.

(*z*) 1 Cla. & Fin. 372.

thereupon, affirmed the decision of the Vice Chancellor, and thus this important point was firmly settled. Lord Brougham, C., considered the case of Lloyd *v.* Carew, 1 Show. P. C. 137, which was decided in the House of Lords, as having settled the rule, for he said the whole question was there gone into (*a*); but the learned Judge who delivered the opinion of the Judges in the House had carefully guarded against any such view. He observed that the cases of Lloyd and Carew and Marks *v.* Marks, 10 Mod. 419, established the point that, for certain purposes, such time as, with reference to those purposes, might be deemed reasonable beyond a life or lives in being, might be allowed. The purpose in each of those cases was to give a third person an option, after the death of a particular tenant, to purchase the estate, and 12 months in the first case, and three months in the other, were held a reasonable time for that purpose. Those cases, however, did not go the length for which they were pressed at the bar of the House; they did not necessarily warrant an inference that a term of 21 years, for which no special or reasonable purpose was assigned, would also be allowed; and he did not state them as the foundation upon which their opinion mainly depended. They were only important as establishing that a life or lives in being was not the limitation; that there were cases in which it might be exceeded. This placed the point in a true light. The opinion of the Lord Chancellor is stated very shortly by the reporters. In a later case, when giving his opinion as a law Lord, he observed that, in disposing of the case of Cadell *v.* Palmer, he showed, he thought clearly, that the doctrine of 21 years and some months had originated in a manifest error originally, arising from the period in which a recovery could be suffered to bar remainders. That argument he, however, perceived had not been reported (*b*). The 21 years and a few months were originally allowed, in the creation of an execu-

(*a*) And see 2 Cla. & Fin. 624.

(*b*) 9 Cla. & Fin. 598; and see 12 Cla. & Fin. 629.

tory devise, expressly upon the ground that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity (*c*). The ground of the appeal in Cadell *v.* Palmer, of course, was that it was an error to take this, which was only allowed with reference to a limitation, as a term in gross.

11. The question as to the right to take the term of 21 years as a term in gross in the creation of an executory devise, was however but one point in the case. The great question was, whether taken altogether the devise was not in a great measure void, as a vain attempt at a perpetuity. The will was prepared with consummate skill. It first took the term of 21 years for the purposes of accumulation; it then took 28 lives, and an absolute term of 20 years after the dropping of the last life, during which successive estates for 99 years were given to descendants in every degree, and a power was given to trustees to convert these chattel estates into life estates of freehold. And at the end of the 20 years after the 28 lives, the regular limitations were to commence in the person who would have then been entitled had the estate been originally limited in the usual way of a strict settlement; and the heirs-at-law were provided for in like manner during the terms of 120 years and 20 years, and after the expiration of them; and this scheme was effected through a devise in fee to trustees. But it is time to draw the reader's attention to the exact limitations. The testator devised his estates to trustees in fee upon the following trusts: 1. During the term of 21 years from his death to receive the rents, and to invest them as often as they amounted to 1,500 *l.* in estates, to be conveyed to the trustees in fee upon the trusts afterwards declared; and the rents till invested in estates were to be accumulated in the funds. 2. During the term of 120 years from his death

(*c*) See the certificate in Stephens *v.* Stephens, For. 232; Sugd. n. to Gilb. Uses, 200.

if 28 lives named or referred to in his will should so long live, and also during the term of 20 years from the determination of the term of 120 years the estates were to be in trust for his nephew, George, for 99 years if he should so long live, and the terms of 120 years and 20 years, or either, should so long continue; and after the expiration of the 99 years' term, in trust for the first and every other son of George successively, according to priority of birth. And after the determination of the estate of each of the same sons, and also as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under or as answering the description of heir male of his body, in trust for the person who for the time being, and from time to time, should answer the description of heir male of his body, or who in the case of the death of his parents, if such death had taken place, would be heir male of his body under an estate tail limited to the same son, and the heirs male of his body; to hold to the same son or person respectively, for a term of 99 years, if the same son or person respectively should so long live, and the said terms of 120 years and 20 years, or either of them, should so long continue; every elder of the same sons, and the person who for the time being and from time to time should answer, or who in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of such parent, if such death had taken place, would answer the description of heir male of his body.—After the determination of other like estates carved out of the terms of 120 years and 20 years, then in trust for the person or persons respectively who for the time being, and from time to time, should answer the description of the testator's heir or right heir-at-law, and if there should be more than one, in the same proportions as they would be entitled to a real estate

descending from the testator as the first purchaser, and vesting in him or them as his right heirs,—and these persons also were to take for 99 years if they should so long live. 3. After the expiration of the terms of 120 years and 20 years the trustees were to convey the estates to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail, or in fee in them, if the same had by his will been devised to the use of his nephew George for life, with remainder to his first and other sons successively, according to the priority of their births in tail male [with like remainders to the other devisees and their sons]. But he provided that no such person should have any other than a contingent estate until the expiration of the terms of 120 years and 20 years, and that in the events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. 4. And he authorized his trustees during the terms of 120 years and 20 years to convey an estate of freehold for life to any person entitled in possession to a term of 99 years. 5. Lastly, the personal estate was to be accumulated for 21 years, and the whole to be invested in lands to be conveyed to the trustees in fee, upon the trusts declared of the estates devised. The Vice Chancellor established the will, and directed the trusts to be carried into execution.

12. The case was elaborately argued before the Vice Chancellor, and the arguments, of which the writer has copious notes taken by himself, are very well reported by Mr. Simons. Mr. Preston, the framer of the will, argued in support of it. The 21 years' accumulation was, he said, supportable under the Thellusson Act (39 & 40 Geo. 3, c. 98). The 20 years were added to the lives in being for the purposes of regulating the enjoyment during these terms, and suspending the right to vested estates of freehold or inheritance. This he supported on the right to take 21 years as a

term in gross. During the period of the suspension of the inheritance the right of enjoyment was not suspended. There could be no perpetuity created out of the terms of 120 years and 20 years; and if open to objection, the trust should be executed cy-pres. This he dwelt upon. The inheritance was well given, and might be well given at law in the same form. The trust for the heirs was not for them as heirs: the word was used as *descriptio personæ*. The time for the estate to be conveyed was within the limit, for it was to be at the end of 120 years from the death of the testator, determinable with lives in being, and 20 years (not the full term of 21 years). The proposition to be maintained was, that a man may suspend the vesting of his estate for any number of lives in being, and 21 years after the determination of those lives. On the other hand, it was insisted that this will was a greater attempt at a perpetuity than had ever before been made. Legal limitations corresponding with the trusts could not be framed and supported. It was admitted that 80 or 90 years would elapse before it could be ascertained who was to take the inheritance. Mr. Preston admitted that if the precedent were to be generally followed, it might be necessary to cure the evil by an Act of Parliament. How much better to restrain such a vain attempt at a perpetuity by a judicial decision. To try the validity of these limitations, let them be considered as legal limitations. The gift to George for 99 years, if he should so long live, and if the terms of 120 and 20 years should so long continue, was good. After his death the gift to his first and other sons for 99 years, if the same two terms should so long continue, would as a gift to unborn sons in succession by itself be good. But the gift is not only to them, but to their issue in succession for 99 years as before. That is clearly bad as a general gift. If, therefore, the 120 years' term, if the lives should so long last, had not been introduced, no lawyer would have supported the validity of the limitation. After the determination of the 120 years' and 20 years' terms, the person

is to be ascertained who is to take the estate as a purchaser. He is to be the person who would have been entitled in case the estate had been limited according to that course of limitations which the law allows. The law has said that a succession of life estates cannot be given to unborn issue, and yet if the limitations of the will were to be supported, there was a contrivance by which any testator might easily evade the rule of law. The whole fee simple being vested in trustees, the limitations were still more objectionable than if they had been legal interests, because there was no division of the inheritance. It was also argued that the ultimate devise was void for uncertainty. In reply it was maintained that legal uses by way of springing uses could be created to the same effect as the equitable estates. The difficulty in framing the latter part of the will proceeded from the necessity of using the words "heir male" as words not of limitation but of description, so as to avoid the operation of the rule in Shelley's case. The person to be described was the person who should at the time be heir male. In the case of Thellusson's will the same objection as to obscurity or uncertainty was taken, but the Judges decided there was sufficient certainty (*d*). The present will was framed with Thellusson's will for a guide against those inaccuracies which suggested objections. One of the leading arguments before the Vice Chancellor was that the term of 20 years could not he taken as a term in gross, and if that had been established the will could not have been supported; at all events to a great extent it would have been void. The Vice Chancellor unfortunately fixed his attention on this point only, not attending to the argument that although the term of 20 years could be supported, yet that the will taken together could not be maintained. Upon the great and general objection, or upon the objection as to uncertainty, he did not say a word.

13. This decision attracted the attention of the Real Property Commissioners, who, in their third report (*e*),

(*d*) Vide *supra*, p. 263. (*e*) P. 33.

observed that in this case limitations of the inheritance were suspended during the lives of 28 persons and a gross term of 20 years, and the estate created for that period was then made the subject of a series of limitations, which, taken by themselves and as limited out of the fee, would have been invalid. A limitation, for instance, to the son of an unborn son for 99 years, if he should so long live, was carved out of it; and although this limitation, if considered by itself, would have been bad, yet when it came to be taken as covering a portion only of the main period assigned for the suspension of the estate, it was held good, for as the whole period did not exceed lives in being and 20 years afterwards, there was no perpetuity; and if there was no perpetuity in the whole, there could be none in the part. After the decease of the surviving life, and at the end of the term of 20 years, the estates were settled to uses in strict settlement, in such manner, however, that the first taker would not be ascertained until that period arrived. The whole of this was effected by a will, which in its different clauses and provisions might be considered as an ingenious and complicated piece of legal machinery.

14. From the decision of the Vice-Chancellor there was an appeal, as we have seen, to the House of Lords (*f*). As the writer was determined that the main objection to the will should not again escape notice, the following was added to the case as the appellants' principal reason (I): Because the whole machinery of the will is a fraud on the rule of law. The accumulation is taken for the whole term of 21 years allowed by the Thellusson Act, and without reference to any minority or any legitimate object of settlement, and it is not until the expiration of that term that the limitations are made to commence. Accumulation and executory limitation were by the law, as it stood before the

(*f*) *Supra*, p. 314; 7 Bligh, N. S. 202; 1 Cla. & Fin. 372.

(I) The reasons are stated in 7 Bligh, 224, as if they were the arguments.

Thellusson Act, co-extensive, but a testator could not first accumulate for lives in being and 21 years, and then postpone the vesting for the like further period. *This is the first step.* Then the estates are devised to trustees for 120 years if 28 persons or any of them shall so long live. These persons are many of them unconnected with the trusts, and the testator was ignorant of their names. This limitation, however, is framed in order to create an estate determinable with existing lives, which therefore has no tendency to a perpetuity; but in the first place it has never been decided that estates, in point of perpetuity, can be carved out of such an estate, which cannot be raised out of the inheritance, and there are powerful reasons against such a decision; and in the next place, it has never been decided that such an estate can be carved out of an inheritance the whole interest in which is intended to be dedicated to the same uses, for the direct and declared purpose of creating a perpetuity; for the equitable estates created out of this portion of the inheritance do not unite with the estates created in the reversion of the inheritance, although the same persons are to take in every event. *This is the second step.* There is then added a term in gross of 20 years upon the same trusts. *This is the third step.* After every rule has been separately resorted to and the time allowed by it exhausted, then comes *the fourth and last step,* a trust for the very persons who would be entitled to the freehold and inheritance under the previous trusts, if regular trusts had been declared for life and in tail according to the usual form of settlements. Why is all this machinery used? The answer is obvious. It is a vain attempt at a perpetuity. Look at the whole as a result from the combination of the several parts, and it will be found that the entire equitable fee simple is dedicated to the particular uses expressed in the will, but those uses so framed as to postpone for probably a vast number of years that right of disposition resulting from ownership, which no regular limitations known to the

law can effect. It seems a sufficient objection to the will in question, that it is the first attempt of the kind, and that the consequences are obviously mischievous. When Lord Nottingham was asked where he would stop, he answered, "I will stop everywhere when any inconvenience appears; nowhere before: for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known." Now, therefore, the time to stop, it is humbly submitted, has arrived; the bounds of reason are exceeded, and the inconvenience is manifest. For the respondents, their reasons insisted that as the rule of law was not transgressed, but its limits were observed by the testator, and he had in all dispositions kept within the limits prescribed by the rule, no argument of fraud on the rule, or of inconvenience from the application of the rule, was entitled to any weight in a court of justice. It was the province of the Legislature, and not of a court of justice, to reform the law if it admits of an inconvenience. No gift, grant, or devise kept within the terms of the rule can be obnoxious to the objection of being a violation of the rule, since the rule is the only criterion by which the validity of the gift, &c., can be ascertained. The case was again elaborately argued, and upon this ground specially. For the appellants it was asked whether, supposing the devise to be, 1st, for the 21 years' accumulation; 2d, limitations for life, with remainders in tail in the usual way; and, 3d, a proviso reducing every tenant in tail to a life interest who was born during 28 lives or 20 years afterwards; could the proviso be supported? Or, suppose a devise in reversion to the testator's right heirs, with a proviso that all heirs born during 28 lives or 20 years afterwards should be reduced to life estates, could that proviso be maintained? It was also insisted that the power in the will to convert the chattel interests into life estates of freehold was not confined within the limit of the 120 years' and 20 years' terms; but that the third generation, for example, might be made absolute tenants for life.

15. Notwithstanding all the pains and caution of the appellants' counsel, the House of Lords fell into precisely the same error as the Vice Chancellor had previously fallen into. The opinion of the Judges having been obtained on the question of the 21 years as a term in gross, and being adverse to the appellants, it was, I suppose, imagined that that disposed of the case, and accordingly the decree below was affirmed, without a single observation having been addressed to the House in answer to the laborious arguments offered to the House upon the highly important point of law under consideration, and indeed without any indication that the Lords were aware that they were called upon to decide this point between the litigating parties. This is much to be lamented, as there is some reason to suppose that a full consideration of the true bearings of the question might have led the House to reverse the decision in the court below, where the learned Judge evidently had not considered the point. The counsel for the respondents, fearful lest the will could not be supported, not only laboured to show that it could be maintained, at least in part or cy-pres, but actually insisted that the case was not ripe for decision, for at least the estate to George was valid: but to this it was answered that the House must decide the point, as the decree below established the will generally, and directed the trusts, that is, all the trusts to be carried into execution. The decision of the Lords, therefore, bound all parties, and thus a scheme for evading the wholesome law against perpetuities has apparently been supported, which it may require the aid of the Legislature to correct. The counsel for the respondents ought to have been required to frame such *legal* limitations as they asserted could be framed in order to give effect to the testator's intention, and the opinion of the Judges should have been asked upon the validity of the limitations as framed.

VII. Of void devises, as too remote.

The consideration of the rules against perpetuities leads us next to consider the cases in which the gifts have been held void as too remote.

1. If an accumulation be in substance created beyond the limit allowed by the Thellusson Act (*g*), it will be void for the excess, although no accumulation is expressly directed. This was decided in the very doubtful case of Shaw *v.* Rhodes (*h*), reversing the decision of the Vice Chancellor and affirming the decree of, in effect, the Lords Commissioners. In that case there were two distinct provisions for accumulation, which, in event, were valid for the whole time. The testator, in the third place, directed that from the period specified the whole of his freehold and copyhold estates should stand charged for 20 years with the payment of two third parts of the clear produce of his freehold and copyhold estates in equal proportions of so much money as would in 15 years make in the whole 30,000*l.*, and which sum, with the interest and produce thereof, he directed should be equally divided between all his grandchildren who should attain 21, their executors or administrators, in equal shares, and charged, as aforesaid, he devised his estates to a grandson in tail with remainders over. It was admitted that none of the accumulations directed was too remote independently of the statute, but it was held that the third clause, although in form a charge, required accumulation, and was therefore void for the excess by force of the Act. But the construction was held to be independent of the Act, that is, the will was to be construed just as if the Act had not passed, but if it were found to contravene the Act, then the provisions of the Act would operate. The validity *pro tanto* of a clause of accumulation depends upon the construction which has been put upon the Thellusson Act.

(*g*) 39 & 40 Geo. 3, c. 98.

(*h*) 1 Myl. & Cra. 135; 5 Cla. & Fin. 114, *nom.* Evans *v.* Hillier; Eyre *v.* Marsden, 8 Sim. 504.

2. Where property is given *for life* to persons *in esse* and to unborn issue in succession, although the gift will, of course, be inoperative as to those who are incapable of taking life estates on account of remoteness, yet it will be supported as to those who are capable of taking for life where there is no preceding limitation which is void as too remote. This appears to be warranted by the case of Tregonwell *v.* Sydenham (*i*), which it is somewhat difficult to understand. The testator, whose will was not affected by the Thellusson Act, devised his Artington estate to his son for life, with remainders to his sons successively in tail male, remainder to the first and other daughters of the son successively in tail, with remainders over: 2. And he devised his Dulverton estate to his son and his sons in tail male in like manner, with remainder to his own second and other sons in tail male with remainder: 3. As to the Combe estate (part of Dulverton), to the testator's brother Floyer for life, with remainder to his first and other sons in tail male, with remainders to others for life and in tail, with remainder to John Sydenham for life, remainder to his first and other sons in tail male, with remainder to the testator's right heirs: 4. And as to the residue of Dulverton, to trustees for sixty years, and then to the same uses as before limited of the Combe estate (No. 3). The testator, who died in 1757, had only one son, who died in 1799, and he had only two children, both daughters, one of whom died in his lifetime unmarried, and the other, Kathêrine, had issue, a son, St. Barbe Tregonwell, who was born after the testator's death, and who was the testator's heir at law. Floyer died without any issue male, and so did the other remaindermen who were to take after him and before John Sydenham. As to the Artington estate, Katherine became tenant in tail of that, and she having died, her son, St. Barbe Tregonwell, became entitled to it in tail. As to Combe estate, and also as to the residue of Dulverton

(*i*) 3 Dow, 194.

(subject as to the latter to the 60 years' term), John Sydenham became tenant for life in possession, with remainder to his son John in tail male.

Our attention must now be turned to the trusts of the 60 years' term, upon which the question depended. These trusts were to receive the rents, and thereby and by granting leases to raise 17,500 *l.*, to be laid out when 2,500 *l.* was in hand in real estates, to be settled on such person *for life*, as by virtue of his will should then be in possession of his Artington estate, or as would have been in possession of the same had no recovery been suffered, and so from time to time till the whole 17,500 *l.* was laid out and the lands settled on the several persons *for life* as should be or should have been, in case no recovery had been suffered on each of the said times in possession of his Artington estate: with such remainder, that on each of the several settlements the estates be so settled as might continue the same as long as it should please God in the blood and name of the St. Barbes. After the 17,500 *l.* should be raised, he directed 2,500 *l.* to be raised and laid out in the purchase of an estate, to be settled in just the same way (repeating the limitations), only substituting the person in possession, &c., of his Dulverton estate for the person in possession, &c., of his Artington estate, and the ultimate object was declared to be to continue the same as long as it should please God in the name and blood of the Sydenhams.

In this state of things John Sydenham and his son filed a bill against St. Barbe Tregonwell, to have the trusts of the 60 years' term declared void, as being too remote, and wholly void as tending to a perpetuity. The Court of Exchequer accordingly decreed the trustee of the term to assign it to the plaintiffs. From this decree St. Barbe Tregonwell, the tenant in tail of the Artington estate and the heir at law, appealed to the House of Lords. For the appellant it was insisted that the trusts of the term might be executed by applying the doctrine in Humberston *v.* Humberston,

1 P. Wms. 332 (I), or if not the heir took by way of resulting trust. For the respondents it was urged that the person to take could not be ascertained till failure of issue male of the body of the testator, which might not happen for two centuries. The decree was reversed and the right of the heir was established as upon a resulting trust, to which our attention will be drawn in another place, but this conclusion could not be arrived at without holding that the uses to which the land was to be conveyed were in the event too remote. Lord Redesdale was of opinion that the trusts were not altogether void, but only that the conveyances of the lands to be purchased were *in certain events* what the law would not permit to take effect, and *so far only* the trusts were void. The only thing to be quarrelled with was his having directed the lands when purchased to be conveyed to such uses. There are uses which *in certain events* the law would not perfect. The defect was not in the limitations made of the purchased lands *in all events*.—The directions for the conveyance of the lands so purchased are legal as applicable to certain persons. The point at which the illegality commences is where the testator limits for life to persons not in existence at the time of his death, as these could not be made tenants for life, at least not with remainders to their first and other sons, but must take a larger estate, so that he was strongly impressed with the idea that the trusts were not originally void, and that the directions to purchase were good.—The purpose intended by the testator was not capable of being carried into effect beyond the direction that the money should be laid out in land, and in the events which had happened none but the heir at law could take. These observations are extracted from Lord Redesdale's judgment. Lord Eldon, after observing that the term was well created, observed

(I) The estate was devised to trustees to convey to many persons *in esse* successively for life, and to their sons, &c. for life, and Lord Cowper executed it *cypres*: he made the sons *in esse* tenants for life.

that he must intimate that though these trusts had been considered as too remote, it was difficult to say that they were so in all events, but as the case had not happened in which they could be carried into effect, it must go to the real representative. The judgment of the House declared that in the events which had happened at the time of failure of issue male of the body of the testator, such of the uses [to] which the testator by his will directed the estates to be purchased should be conveyed as would otherwise have been capable of taking effect were too remote, and therefore void.

3. The judgment of the House in effect was, that the uses were only partially void, and Lord Redesdale pointed out where the illegality commenced, viz. where the testator limited for life to persons not in existence. Now the lands to be purchased with the 17,500 *l.* were to go to the persons entitled to the Artington estate. Katherine, the daughter of the testator's son, the tenant for life, was tenant in tail of the Artington estate, but it seems clear that the House of Lords held that she, had she been living, would have taken the purchased estates for life. Her son could not take, although the owner of Artington, because he was not born in the testator's lifetime. The circumstance that Katherine was tenant in tail of Artington was manifestly held to be, as it was, unimportant. For it was immaterial what estate she had in Artington. She answered the description of the person to take, and she was to take a life estate in the lands to be purchased, which she was capable of doing (I). Now as to the Dulverton estate, that, in failure of the prior limitations to the testator's son and his issue male, was limited to Floyer for life, with remainders over. That would clearly have been valid as to Floyer, had he lived to come in possession of Dulverton. Whether any uses would have been executed in favour of any of his sons,

(I) I cannot discover from the reports or printed cases when Katherine was born, but it was probably after the testator's death.

had he had any, is another question. But in the events which happened, the gift could not be supported as to John Sydenham, the plaintiff, or those in remainder after him, because the previous limitations, which would embrace in terms unborn children for generations, were too remote, and therefore void. It is of great importance to keep in view what the opinion of the House really was in this important case.

4. We now come to the great case of Lord Deerhurst *v.* Duke of St. Albans (*k*), heard in the House of Lords under the name of Lady Laura Tollemache *v.* Lord Coventry (*l*), where the question was, how far under a general limitation a settlement could be carried of chattels which were directed to go along with an honor. The first Lord Vere by his will gave to trustees his household goods, &c. in his mansion house, upon trust for his wife for life, and after her decease for his son Aubrey for life, and after the decease of the survivor of them in trust for such person as should from time to time be Lord Vere, it being his will that the same should, after the decease of his wife, go and be held and enjoyed with the title of the family, so far as the rules of law or equity would allow. The state of the family at the time appeared on the face of the will, by which he directed an estate which he ordered to be purchased, to be settled in the usual way to his wife for life, to his son Aubrey for life, and then to his grandson Aubrey for life, and to this grandson's sons in tail male, and to his grandson William for life, and to his sons in like manner. The testator therefore had an only son, Aubrey, who had two sons, Aubrey and William. The testator and his wife both died before 1784. Aubrey, the second Lord Vere, who was made expressly tenant for life, died in 1802, and was succeeded by his son Aubrey, third Lord Vere, who died in August 1815; he had a son born in April 1815, who became

(*k*) 5 Modd. 232.
(*l*) 2 Cla. & Fin. 611; 8 Bligh, N. S. 547.

on his father's death fourth Lord Vere, and died in February 1816, and he was succeeded by William, the grandson, the fifth Lord Vere. The property was claimed by the plaintiffs, as personal representatives of Aubrey, the fourth Lord Vere, on the ground that it vested in him absolutely. The defendants claimed as personal representatives of Aubrey, third Lord Vere, on the ground that it vested in him, and all the ulterior trusts were void. William, the fifth Lord Vere, also claimed, but this claim was ultimately abandoned. The case was elaborately argued. For the representatives of Aubrey, the third Lord Vere, it was argued that as the first taker of a class the absolute interest vested in him. It was uncertain whether any person *in esse* would become Lord Vere. The grandson became Lord Vere, but that was by accident, not merely because he was *in esse* at the will, but because he fell within the character and description of being the first next successor to the Peerage. Sir John Leach, V. C., held that there was a direct gift, and nothing executory. By the rules of law and equity, he said, every person living at the death of the testator who should become Lord Vere might be limited to the use and enjoyment only. The son and the grandson of the testator were living at his death, and were both therefore limited to the use and enjoyment only, but the child who succeeded the grandson as Lord Vere was not living at the death of the testator, and could not therefore, by the rules of law and equity, be limited to the use and enjoyment only (I). He took therefore an absolute interest, which was then vested in his personal representatives. This was not considered a satisfactory way of disposing of such an important case, and the representatives of Aubrey, the third Lord Vere, appealed to the Lord Chancellor. The case, after having been heard by Lord Eldon, was reheard by Lord Lyndhurst, and the decree affirmed without any reasons, just as he was about

(I) This, as an abstract point, is incorrect.

to resign the Great Seal (I). From this decree there was an appeal to the House of Lords. For the appellant it was argued that the executory bequest to the person who should be the first taker of the title of Lord Vere, after the death of the survivor of the testator's widow and son, was a bequest which must of necessity vest, if it ever vested, in some person who either was in existence at the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life, and was therefore good in law. But the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title, was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or 21 years after the dropping of any such life, and therefore was not valid. Such was the line of argument for the appellant. For the respondents it was argued that the title by law must go to the son, grandson, and great grandson in succession; that was the plain meaning of the limitation, and according to that limitation it was good in law. The gift was to the son, the grandson, and his first son by necessary inference, as plainly as if the testator had so said in express terms. Two persons were named in the will to take for their lives; then the property is given to a person actually in existence, and who answers the description in the limitation, and the ultimate limitation was to his unborn son. The grandson, who was living, must of necessity become Lord Vere in the course of events. Lord Brougham, C., said the question resolved itself into this: whether or not the testator had done that which the rules of law permitted when he made a limitation—not to a series of persons *in esse*, and to the survivor of them, and to the first and other sons of that sur-

(1) The judgment in the House of Lords was given on the day of the prorogation of Parliament.

vivor—but a limitation to one person *in esse* by name, as purchaser, with remainder to all persons who, "from time to time, should successively become Lord Vere, as far as the rules of law and equity would permit;" from which last limitation this implication was sought to be raised, that the first unborn issue of the last person answering the description of Lord Vere, and *in esse* at the time of the will, and the death of the testator should, according to the analogy of the rules of law, take an absolute interest, the prior taker taking only for life. After stating that there was no authority in favour of the limitation, the Lord Chancellor observed that they were therefore compelled to have recourse to principle; and so regarding the question first of all, they might admit that the testator might have done successfully what he had attempted to do, if he had been minded to take another course; he might have so contrived as that every one person [living] who successively became lord Vere, should take a life interest, and that thus the unborn issue of the last taker should have the principle [the absolute interest] by giving him what would be an estate tail in realty, and consequently an absolute interest in personalty. All this might be admitted: he might have annexed the chattel interest to land entailed to a certain succession of heirs, in such a manner as to carry the chattels to certain uses of that settlement, and so to accomplish his object. He then paused to consider how difficult it was to annex chattels personal to a title. This was a new invention, treating Lord Vere as if he were a corporation, with perpetual succession; and though it was true that the third Lord Vere was alive at the time of the will, and you only give to the fourth Lord Vere, his unborn issue, that which the rule of law would enable you to give, if the event had happened, it does not follow because you are wise after the event, that therefore you are *to put a construction on the instrument, which you have no right to do,* to meet that which has accidentally happened after the date of the instrument. The Lord Chan-

cellor then put the case of a barony in fee, and relied upon the difficulty which would arise in case of an abeyance. And although the barony of Vere was limited to the heirs male of the body, yet the same rule would apply to the one or the other. He said he would put the case of a limitation of the barony by patent to Aubrey, the first Lord Vere, and the eldest son, and the heirs male of his body, and with remainder to the heirs male of the patentee's body. He would put the case of his having an eldest son, and of that eldest son having a brother who would succeed, failing the eldest son and heirs male of his body, under the limitation; and he added to the case the supposition that the eldest son had a son; suppose the eldest son committed high treason, and there was an attainder and corruption of blood worked (I); as long as there was issue in existence, any issue in tail of that eldest son so attainted, the title was extinct, and no one had it. If that issue fail altogether, then the title goes to the second son of the patentee, and then comes a Lord Vere into existence fifty or sixty years hence. He held it to be a mere fallacy to say that the Lords Vere were all *in esse, and that at the death of the testator, or rather the date of the will, that Lord Vere was in esse, on the failure of whose life estate, the fourth Lord Vere, the first unborn issue took.* The man was *in esse*, but Lord Vere was not. In conclusion, he freely acknowledged that some of the arguments which he had used, he meant particularly respecting the attainder and abeyance, would apply, not merely to the case of Aubrey, the fourth Lord Vere, but in some degree to Aubrey, the third Lord Vere. He felt all along the possibility of such application; but besides its much more pointed application to the case at bar, he was bound by

(I) The supposed pedigree would stand thus:

1. Lord Vere.

Eldest son attainted. | son.

Second son.

decision and authority in the one case: he must run in the face of authority if he denied the third Lord Vere's right, but he had no decision, nor any authority supporting the other. He moved the House that the decree of the court below should be reversed (I); and accordingly the decree, so far as it was complained of, was reversed. It was, no doubt, an oversight not to add a declaration of the right of the third Lord Vere.

5. The effect of simply reversing the decree was to disaffirm the title of the infant, the fourth Lord Vere, but not to establish that the whole interest vested in Aubrey, the third Lord Vere, although it is clear that the House intended to establish the right of the latter to the absolute property. I am not surprised that the decision has been misunderstood; and certainly it does not settle the point as to the construction of the gift to the third Lord Vere. In a later case (*m*), Mr. Justice Cresswell, in delivering his opinion to the House, observed, that in the above case, the original decision was in favour of the fourth Lord Vere. On appeal that decree was reversed; and as the litigant parties were the representatives of the third and fourth Lords Vere, that had often been treated as a decision that the third Lord Vere would take under the will. But that was not so. *The whole of the reasoning of Lord Brougham showed that the executory bequest, after the death of the second Lord Vere, was void, because it possibly might not vest in due time.* The decision therefore must be taken to have been, not that the bequest was good as to the third Lord Vere, but that it was

(*m*) 12 Cla. & Fin. 566.

(I) According to Mr. Bligh's Report, vol. 8, N. S. 567, Lord Lyndhurst concurred in this view, and observed that the arguments upon the subject of abeyance of peerages urged by the Lord Chancellor were entirely new: but see the note to 12 Cla. & Fin. 555, which shows that the observations attributed to Lord Lyndhurst were not, and could not have been made in the House. See also 12 Cla. & Fin. 630, where Lord Brougham said that *he* had reversed the decision.

bad as to the fourth. Mr. Justice Patteson (*n*), said that the trust was held to be void, as an implied bequest for life to the third Lord Vere, but was good to vest the chattels absolutely in the person who should be Lord Vere at the death of the survivor of Lady Vere and Aubrey Beauclerk, that is, the third Lord Vere. Mr. Baron Parke (*o*) remarked that the decision was surely an authority that, in a limitation in a series of bequests, one of which is within the limits, may be good, though the others are bad; for the House held that the chattels vested in the third Lord Vere, though the other bequests were too remote. Lord C. J. Tindal, who rarely misunderstood or misquoted a case, said that the House held the bequest to be void (*p*).

6. It is of course denied by none that the testator might by plain words have limited the chattels precisely as they would have gone had the Vice Chancellor's decree remained undisturbed. No rule of law therefore stood in the way of his construction, if such was the testator's intention, and the expressions of the will authorised his decree. The intention of the testator was not disputed. The objections raised in argument could not be supported, because this was not like the case of Kerr *v.* Lord Dungannon, to which our attention will presently be drawn, where only one person was to take, and it depended on the event whether the person who lived to answer the description, would or would not come *in esse*, within the legal period; but here several persons were intended to take in succession, and the legal limit could therefore be ascertained. After the determination of the express estates for life, the gifts, as expressed in the will, and as proposed by the intended judgment in the Lords, stood thus (I).

(*n*) 12 Cla. & Fin. 593.
(*o*) 12 Cla. & Fin. 608.
(*p*) 12 Cla. & Fin. 620; see Lord Brougham's observations on the case, 12 Cla. & Fin. 632.

(I) That is, supposing the opinion expressed by the Lord Chancellor had been followed by a corresponding declaration by the House.

THE WILL.	THE JUDGMENT.
In trust for such person as shall from time to time be Lord Vere, it being my sole motive that these chattels shall from time to time go, and be held and enjoyed with the title of the family, as far as the rules of law and equity will permit.	In trust for my grandson Aubrey, if he shall live to become Lord Vere, his executors, administrators and assigns.

This of course strikes out of the will not simply the gifts over, but the direction that the chattels are to go with the title, as far as the rules of law and equity will permit; for, as was shown in argument by the counsel for the plaintiffs in the court below, the authorities prove that under such a gift in ordinary cases, equity will carry the chattels in the channel directed by the decree of the Vice Chancellor. But then it was said, 1. That there was no authority for this construction, and for this purpose the case was treated as if the concluding sentence was not in the trust; and, 2. That here the gift was to a succession of peers. Now upon the first head the case of Tregonwell *v.* Sydenham, which we have already fully considered, is a grave authority for giving effect to such a trust, as far as the events will allow, keeping within the legal boundary. It is said that we are not to be wise after the event; the validity of the gift cannot depend upon an accident; we cannot put a construction on the instrument which we have no right to do, to meet that which has accidentally happened after the date of the instrument. These reasons apply to such a case as Ker *v.* Lord Dungannon (I), but not, it is submitted, to the case under

(I) In that case Lord Brougham observed that in the case of Tollemache *v.* Lord Coventry, it was a pure accident, and could not affect the thing; it must be of the necessity of the case, and the rule must not be allowed to be varied or modified by accident; 12 Cla. & Fin. 630.

consideration. Who is capable of taking, and what estate, constantly depends upon the event, and here the testator knew the exact state of things: he knew he had two grandsons living, and he expressly made them tenants for life of the estate directed to be purchased. His intention was the same as to the chattels, but the framer of the will thought he could include the grandsons and their issue male, Lords Vere, under one general trust, qualified to be operative only so far as the rules of law and equity would permit, without taking the trouble of making Aubrey, the grandson, expressly tenant for life; and besides, he could not well make this grandson tenant for life in express words, without giving the like interest to his brother William, and as William was not to take until after failure of his brother Aubrey's male issue, that would have rendered it necessary to do the very thing which he wished to avoid; namely, to insert a regular trust, defining each estate, with shifting or executory gifts over. If the decision in the Lords is to be supported it must, it should seem, rest on the second point. It is always to be regretted when a Judge feels himself under the necessity of deciding a case upon a point not argued at the bar; still an appeal lies, but if the court of ultimate appeal decide upon a new point without hearing the case reargued, and should miscarry in its judgment, the suitor is without redress. It did not occur to either side that there was any objection to limiting the chattels to go with the barony beyond the question where the trust was to stop. But the objection of the Lord Chancellor went to the root of the trust: if a valid objection, it proved too much for the judgment of the House. This it was that induced one learned Judge to say that the whole of the reasoning of Lord Brougham shows that the executory bequest after the death of the second Lord Vere was void, because it possibly might not vest in due time, and a learned Chief Justice to state that the House held the bequest to be void. The Chancellor of Ireland, in the case of Ker *v.* Lord Dungannon, observed

that he did not understand the grounds of the reversal, particularly that portion of Lord Brougham's judgment respecting an attainder, or an abeyance of the peerage; for the argument would have applied as well to the first grandson as to the other (*q*). The Lord Chancellor increased the difficulty in this case, where the chattels were to go with a peerage limited to the ancestor and the heirs male of his body, by showing what might happen if the barony had been in fee, or with a remainder; but this case could only depend on the actual limitation of the barony with which the chattels were to be enjoyed, and that limitation was in tail. It was said there might be an attainder for high treason; but that, it is submitted, although it would operate as a forfeiture of the dignity, could not render the whole trust void in its creation, but like any subsequent accident it would affect the rights of the parties intended to take. Because in certain events there may be no person capable of taking, is not a sufficient reason why those should not take who are capable of taking, and within the line of perpetuity. It would be difficult to bring the rule against perpetuities to bear against the trust on this ground. But Lord Brougham did *not* hold the trust void; he actually supported it, to the extent of vesting the property in the third Lord Vere, who was only entitled under the general trust for the person from time to time Lord Vere; and yet he treated it as a fallacy to say that at the date of the will this Lord Vere was *in esse*; the man was *in esse*, but Lord Vere was not. He was perfectly aware how difficult it was to reconcile the actual decision with the grounds upon which it proceeded, for he observed, as we have seen, that the arguments respecting the attainder and abeyance would apply in some degree to Aubrey, the third Lord Vere, but he was bound by decision and authority in the one case: he must run in the face of authority if he denied the third Lord Vere's right, but he

(*q*) See 1 Dru. & War. 536.

had no decision nor any authority supporting the other. After all, therefore, the trust although general was supported to some extent depending upon the event, and the only question is whether the third Lord Vere should have been held to take the absolute interest. Admit that the third Lord Vere is entitled, and you establish the validity of the trust to that extent depending upon the event, and if that be valid there is no reason why he should not be confined to a life interest, and the fourth Lord Vere be held to take the absolute interest according to the decree below. I am not aware of any decision and authority which bound the House to establish the trust for the third Lord Vere, which would not equally support the trust for the fourth lord. Following the authorities was to abandon the only ground upon which the judgment of the House rested. These authorities clearly establish that chattels or estates may be limited to go along with an honour, where in other respects the law is not infringed. Thus in the great case of the Duke of Newcastle *v.* Lady Lincoln (*r*), Lord Loughborough, C., during the argument observed: Suppose the whole subject was leasehold estate and stood upon *an article* that it should be conveyed according to the limitations of an honour, and a bill was brought to carry the settlement into effect after a child had lived a day, should I permit the father to say it was his property—there could be no doubt of the intention that it should go from son to son. In Bacon *v.* Procter (*s*), the premier baronet of England, under a patent conferring the dignity on his ancestor and the heirs male of his body, directed the rents of his estate to be paid unto or for the benefit of such person of his own name, blood, and family as for the time being should succeed to his title of premier baronet of England, to the intent that the estate might be continued and preserved in the name and blood of him, and that the rents might be enjoyed and go along with his title

(*r*) 3 Ves. 394. (*s*) Turn. & Russ. 31.

so long as the rules of law or equity would permit. The testator had five children living, and his eldest son had issue two sons living at the death of the testator, and it was held that the eldest son was tenant for life, and liberty was reserved to the parties to apply on his death; and this decision was acquiesced in simply because it was the general opinion of the bar that it could not be disturbed. The learned counsel for the plaintiff, the eldest son (Mr. Shadwell and Mr. Preston), insisted that the gift was void, but if not, they argued that the law would not permit it to be effectuated beyond the extent of giving either an estate to the heirs male of the body of the first baronet, which would give an estate in tail male to the plaintiff, *or by giving successive life estates within the rule against perpetuities*, with remainder to the heirs male of the body of the first baronet (I). And in an earlier case (*t*), where Lord Dorchester's estates were limited by settlement to himself for life with remainder to his eldest son, Christopher, for life, with remainder to Christopher's first and other sons in tail male, with remainder in succession to the other children of Lord Dorchester for life, with remainder to their first and other sons in tail, and with a power of revocation reserved to Lord Dorchester, who exercised it by directing by his will "all his landed estates to be attached to his title as closely as possible." After Lord Dorchester's death his grandson, then Lord Dorchester, who would have been tenant in tail under the settlement, had it not been revoked, filed a bill praying to be still

(*t*) Lord Dorchester *v.* Lord Effingham, 3 Beav. 180 n.

(I) See Mackworth *v.* Hinxman, 2 Kee. 658, decided subsequently to Tollemache *v.* Lord Coventry; it shows that it is still considered that chattels may be bequeathed to go along with an honour. In that case Robert could not take, because James's unborn issue, if there had been any, would have taken before him; but there does not appear to be any reason why James should have been held to take so as to defeat his issue if he had had any; see 1 Dru. & War. 537.

considered as tenant in tail. The parties who would have been entitled in remainder under the settlement after the limitation to the plaintiff and his issue, insisted that upon the true construction of the will the plaintiff ought to be declared to be tenant for life of the estates, and that they would become entitled, upon the death of the plaintiff, to successive estates for life therein, with remainder to their respective sons in tail male. By the decree, Sir William Grant, Master of the Rolls, declared that by the effect of the testator's will the estate tail of Lord Dorchester in the settled estates, and the estates tail of all other the male issue or descendants (if any) of the testator *in esse* at the time of the testator's death in the same estates, were abridged to estates for life only, with remainder to their first and other sons successively in tail male in strict settlement. This decision and the decision in the Lords cannot stand together. Sir William Grant's decision fully authorizes the original decree in the case under consideration.

7. But where the estate is so limited that it may vest in a person not born within the legal limit, the devise is altogether void. Therefore where there is a general limitation, a single gift to one of a class, which may, according to the event, vest the estate in one within the line of perpetuity, or in one without its boundary, the devise wholly fails, although in event there is a person answering the description ready to take who was born within due time. This is the case of Ker *v.* Lord Dungannon (*u*), heard in the House of Lords by the name of Lord Dungannon *v.* Smith (*x*). Lord Dungannon gave his leasehold estates to trustees, in trust for his grandson, Arthur, for life, and after his decease to permit such person who, for the time being, would take by descent as heirs male of the body of his grandson, to take the profits until some such person should attain the age of 21 years, and then to convey the same

(*u*) 1 Dru. & War. 509; Flar. & Kel. 638.
(*x*) 12 Cla. & Fin. 546.

unto such person so attaining the age of 21 years, "his executors, administrators, and assigns," with executory gifts over. The case came before the Chancellor of Ireland upon a rehearing (I), and ultimately was decided upon another ground, but the point having been argued, he declared his opinion to be that the gift was wholly void. The claim was by Lord Dungannon, who was the eldest son of the testator's grandson, Arthur, and who had attained 21 in his father's lifetime. The Court observed, that to support the will, it must be contended that the limitation was made up of separate and distinct gifts to individuals, and was not a single gift to [one of] a class: they would have to divide the clause, making two gifts; in the first place, one to the particular person, and then, in certain events, a series of gifts over, which it was admitted would be void. And there could be no doubt that in this way of construing the will a valid gift was made to Lord Dungannon. But the question for him to consider was, was he authorized in point of intention in the first place, and of construction in the next place, to extract from the first sentence a distinct limitation, and to apply it to Lord Dungannon? It was perfectly true that Lord Dungannon did happen to fill the character contended for by his counsel, yet was it not as true that Lord Dungannon's son might have equally well answered the description of the person designated, and in the event of the son dying under 21, the grandson, or great grandson, might in like manner have been the first person who answered the description of the next heir male to take by descent. Could he give this property to any person answering the description at any period, however remote? If Lord Dungannon was to take this property, it was not because he was 21 at the time of the death of the tenant for life, and within the limitation, but because he

(I) Lord Plunket dismissed the original bill, and thought the limitation too remote, but recommended a rehearing before his successor; see 12 Cla. & Fin. 559, n.

was the first heir male who attained that age, and thereby was, out of a particular class, the first to answer the description in the will. This proceeding led the next of kin of the testator to file a bill, claiming the property as undisposed of, in consequence of the remoteness of the bequest, and Lord Dungannon having put in a general demurrer, that was overruled at the Rolls in Ireland, and from that decision there was an appeal to the Chancellor there, who, retaining his opinion, suggested that it would be better to go at once to the House of Lords without having his judicial opinion against the defendant. This course was accordingly adopted, and twelve of the Judges attended the argument in the House of Lords upon the appeal. The admission of the Chancellor of Ireland, that the gift would be valid as regarded Lord Dungannon, if it could be read as distinct and separate gifts, was much relied upon by the appellant's counsel, who insisted that that was the true reading and construction (I), and it was particularly insisted that the case of Tollemache *v.* Lord Coventry (II), which we have just considered, could not possibly be sustained without admitting the validity of the appellant's title. Of the twelve Judges, eleven of whom delivered their opinion to the House, nine were of opinion against the validity of the bequest, and two were of opinion that it was a valid gift to Lord Dungannon. The case was discussed on both sides with great learning and ability, and the arguments will repay the student's careful perusal. The two Judges in favour of the appellant considered it as a case of construction. The testator's intention was not doubtful, he might have rendered valid the first gift if he had made it a separate one to the person who, at the death of his grandson, would take by descent as heir male of the body of the grandson, with a gift over, and

(I) MS. report of the argument; and Mr. Baron Parke took this view; see 12 Cla. & Fin. 609.

(II) It was said that this case appeared to have been much misunderstood by the Master of the Rolls in Ireland, nor did the Lord Chancellor there much relish it.

although the testator had used a more concise form, the form he had used conveyed the same meaning. At the death of the grandson one person only could answer the description whether he were the son, grandson, or great grandson of "the grandson." He therefore seemed to be the individual intended, the person designated, just as much as if the will had been made in more extended terms. The testator had given the rents and profits during minority to the particular individual who, at the death of the grandson, should be heir male of his body, and the estate itself to the same person, if he attained 21. One of the two learned Judges relied upon the circumstance that the bequest of the estate itself and of the profits were in the same will, admitting that if the bequest of the estate itself and of the profits had been in two separate bequests, each in a separate instrument, unconnected with each other, each of them must have been bad. This was assuming that at the death of the testator there was no heir male major in one case and minor in the other. The case was the same in effect as if the testator had expressly directed the trustees at the death of the grandson to give the profits to the heir male then in being if a minor, and the estate if he should be a major, and if he should die under 21, then to the next if a minor, and the estate if a major, and so on in a series of consecutive limitations; as to the first number of the series, nothing was wanting to enable him to take, except that he should be heir male in existence at the death of the grandson, and that condition must be fulfilled, if ever it is fulfilled, at the death of the grandson, and in that respect he differed from every subsequent member of the series; with respect to them the bequest might or might not take effect within the limits, and were therefore void. Tindal, C. J., who delivered his opinion after the two learned Judges, said that it appeared to him that the proposed mode of reading the will was not the interpreting the will as it was, but virtually making a new will for the testator. Lord Lyndhurst, C.,

thought that the testator had not in contemplation the granting of successive estates in the terms stated in the arguments by the two learned Judges; and if the House were to adopt this construction for the purpose of getting out of the difficulties arising out of the law of perpetuities, they would be, in fact, as he considered, making a perfectly new will for the testator. Lord Brougham concurred: he did not see how the case of Tollemache *v.* Lord Coventry could be sustained; he was sure he could not sustain the case, certainly not the doctrine (I), if the decree in the case before the House were reversed. Lord Cottenham and Lord Campbell were of the same opinion, and thereupon the order appealed from was affirmed with costs (II).

8. Mr. Baron Parke in delivering his learned opinion in favour of the appellant, thought that the Master of the Rolls and the Chancellor of Ireland improperly placed reliance on the cases of Leake *v.* Robinson, 2 Mer. 363, and Jee *v.* Audley, 1 Cox, 324, as the distinction appeared to him to be very clear between a bequest to a class who are to take concurrently, and whose title depends upon a contingency common to all, that is, being in existence and filling a particular character at a particular time, and a gift to a *series* of persons who are to take successively, and the title of the first of whom is different from the rest and depends upon a contingency not common to the others (*y*). This view, of course, depended upon the learned Judge's opinion that the bequest could be read as distinct gifts, but the opinions in Ireland proceeded upon the ground that the bequest was general until some person answered the full description, and was just as much a gift to a class as the gift in Leake *v.* Robinson, although the persons within the class were to take succes-

(*y*) 12 Cla. & Fin. 606, 607. See 1 Dru. & War. 533.

(I) This may be true as to the doctrine.

(II) Considering the novelty of the question, and that the decision defeated the will, it was rather hard to make the appellant pay the respondent's costs.

sively and finally, only one of them absolutely, and not jointly and together, as in Leake *v.* Robinson. Several of the Judges whose opinions were against the appellant relied upon the cases of Jee *v.* Audley and Leake *v.* Robinson. The Chancellor of Ireland observed that as to Lord Southampton *v.* Marquis of Hertford, 2 Ves. and Bea. 54, and Marshall *v.* Holloway, Swanst. 432, which had been cited, though he had not looked into them lately, yet from his recollection of them, aided by what had fallen from the counsel, they appeared to him rather against than in favour of Lord Dungannon, and he stated what those cases decided. Mr. Baron Parke observed in the House of Lords that most of the cases which the Chancellor of Ireland considered as bearing against the claim of the first taker, surely were distinguishable. Leake and Robinson he had already remarked on. In Lord Southampton *v.* the Marquis of Hertford there was a trust to accumulate for the benefit of persons who would not necessarily come into existence within the limits. It was an attempt to give to a party who might not have come into existence for ages, and was therefore wholly void; and the case of Marshall *v.* Holloway, the learned Judge observed, was subject to the same observations. It has, no doubt, been considered that the cases above referred to did depend upon the point mentioned by the learned Judge (*z*), and the judgment of Sir William Grant in Lord Southampton's case probably led to this view, for he expressly stated that the deed said that the fund should go to the first person entitled to the estate who should attain 21, though there should be no such person for a century to come. But this does not appear to be correct. The estate was settled in strict settlement, and the trust, as regards this point, was during the minority or respective minorities of any person or persons respectively, who for the time being should, by virtue of the limitations, be immediate tenant for life or in tail in possession, that the trustees should receive the rents, and should, during such

(*z*) Ferrand *v.* Wilson, 4 Hare, 377; 10 Sim. 376, arg.

minority or respective minorities accumulate it, and should stand possessed of the fund and its accumulations in trust for such *person or persons respectively* as should *immediately upon the expiration of such minority or respective minorities as aforesaid, or the death or deaths of such minor or minors*, be tenant or tenants in possession or entitled to the rents, and be of the age of 21 years. This, therefore, appears to be a trust which admitted of severance, if no rule of law stood in the way of that construction: for there is a new gift in effect at the end of every minority by attaining majority or by the death of the minor, and if there was a person then *immediately* entitled to take, the fund is given to him: still the trust was clearly void to the extent in which it embraced minorities beyond the legal limit, but it might have been supported as to the tenant for life, who of course was *in esse* when the settlement was made, and as to his son, the first tenant in tail: and no doubt this it was that induced Sir W. Grant to pause before he held that the trust was void altogether. The case of Marshall *v.* Holloway appears not to support the learned Judge's view of it. The trust was to accumulate personal estate and the rents of real estate from time to time as often as any person or persons beneficially entitled to any real or personal estates under the trusts afterwards declared should be under 21, and as to the estates and the accumulations upon trust for the eldest son then living of his daughter Catherine (then of the age of five years), during his life, with remainders over in strict settlement. This trust, therefore, for an accumulation during the minority of the infant tenant for life making him tenant for life of the fund with gifts over, was free from all objection on the ground of perpetuity, and could only be affected because it was included in one general gift which included minorities beyond the limit. Lord Eldon held the trust for accumulation to be wholly void, but, I do not quote from the report but speak from my own knowledge, in the first instance he was strongly inclined to

support the trust, and his mind was for some time in doubt upon the subject. There is much reason to suppose that his first was the better view, and fully warranted in law: however the point is now well settled (*a*). In conclusion it may be stated that the Vice Chancellor lately observed that it never occurred to his mind that the case of Lord Southampton *v.* the Marquis of Hertford was determined with reference to what was done with the fund accumulated; and Lord Eldon's language, he added, in Marshall *v.* Holloway was express and clear. It is important with reference to the case in the House of Lords which we have been considering that the true ground of the decisions in the cases upon accumulation should be understood.

9. In Boughton *v.* Boughton (*b*), the testator gave his real and personal property to trustees upon trust (amongst other things) out of the rents and profits, to pay certain sums for the education, maintenance, or benefit of each of the sons of his nephews John and Joseph, till they respectively attained the age of 25 years; but in the event of the death of any of them under such age the provision intended for such one or more of them as should die under such age should no longer be payable; and the surplus rents were to be accumulated; and the trustees were to stand seised of the trust estate and its accumulations, upon trust when and as soon as that any son of either of his nephews, John and Joseph, should have attained the age of 25 years a valuation should be made, and the estate should be then divided into as many lots as there should be sons of his two nephews then living, and that each of his said nephews' sons (subject to the proviso) when and as they should arrive at the age of 25 years should choose one portion for

(*a*) Browne *v.* Stoughton, 14 Sim. 369; Boughton *v.* James, 1 Coll. 27; and see and consider Crosse *v.* Glennie, 2 You. & Col. 237; Ferrand *v.* Wilson, 4 Hare, 344.

(*b*) Printed Cases, D. P. 1848, not yet regularly reported; 1 Coll. C. C. 26, *nom.* Boughton *v.* James; since reported, 1 H. of L. Cases, 406.

him and his children, to be conveyed upon trust for the person so selecting the same for his life, and then for his children. The proviso gave over to the others the shares of any sons dying under 25 years of age, or having attained that age, dying without issue, him surviving. Both of the nephews had sons living at the testator's death, but no such son died in the testator's lifetime leaving issue, or attained the age of 25 in his lifetime, or had issue living in the testator's lifetime, or at his death (*c*). Sir J. L. Knight Bruce, V. C., was of opinion that the testator did not intend solely or confine himself to great nephews, who had come, or should come, into existence before his death, and consequently if all his great nephews living when the will was made, and all his great nephews living at his death, had died bachelors, under 25, there might still be a son of one of the nephews capable of taking an interest under the language of the will, supposing all objection on the ground of remoteness out of the way. He held that the trust for the accumulation failed, and failed without accelerating or benefiting the postponed life interests, as to which the testator appeared to him plainly to have given them, so as neither to commence nor to vest until some son of one of his two nephews should attain 25. He thought he had not given them so as to vest at his own death, subject to the postponement of enjoyment, and to be contingently divested, and that they were therefore void: And he held that a life interest stood in this respect upon the same footing with a fee simple; and his opinion was, that the life interest in the residue being so given as not to vest within the period prescribed by law—that is, being so given that every life in being at his death, and more than 24 years might expire without the ascertainment what or whether any great nephew or number of such great nephews could claim a life interest in the whole, or any portion—the dispositions of the residue entirely failed. Upon an appeal to the House

(*c*) See 1 Col. C. C. 43, 44.

of Lords the decree was in this respect affirmed upon the motion of Lord Cottenham, C., who considered the case as governed by that of Leake *v.* Robinson, 2 Mer. 363; the gift, he thought, was not qualified by the direction for maintenance; the annuities and provisions for maintenance were given without reference to the ultimate gift of the accumulated surplus, the gift therefore was too remote and void.

10. A reversion or remainder may be limited in like manner as an estate in possession, but of course the estates limited to arise out of it, cannot take effect in possession until the reversion or remainder itself falls in. It is immaterial when that event happens. A reversion cannot any more than an estate in possession be limited, irrespective of the previous estates upon which it depends, beyond the legal limits: a devise therefore of a reversion in case of a general failure of issue will be void where all the issue are not provided for under the previous settlement, and even where the devise is of the reversion, the Court will not support the devise as an immediate one of the actual reversion dependent upon the estates really limited to the issue.

11. This was decided in the case of Bankes *v.* Holme (*d*) in the House of Lords. The remainder in fee of the estate expectant upon a life interest was settled in 1771, upon marriage, after and subject to certain terms of years, one of which was created for raising portions for the younger children of the marriage, and after successive life estates to the husband, Ridgway, for life, and his intended wife Diana for life, to the use of the first and other sons of the marriage successively in tail *male*, remainder to the daughters of the marriage as tenants in common in tail, with cross remainders in tail, remainder to the settlor, Ridgway, in fee. The remainder fell into possession, and the settlor, by his will, executed about two years after the settlement, recited that by the settlement he was seised of the reversion

(*d*) Printed Cas. D. P. 1824; 1 Russ. 304, n.

in fee-simple expectant upon and to take effect in possession immediately after the decease of his wife, in case, and upon the contingency that there should be no *child or children* of his wife by him begotten, or there being such *all* of them should depart this life *without issue*. He then in case he should die without leaving any child or children, or there being such, *all* of them should depart this life *without issue*, gave "the aforesaid reversion" to certain uses in favour of different members of his family. The settlor died shortly afterwards, leaving an infant son, his only child, who died in a short time, of course without issue. The heir at law of the settlor claimed the estate on the ground that the devise was too remote and void, being to take effect after a general failure of issue (I), and so it was decreed; and this decree

(I) The case appears by some of my notes to have been argued in the Court of King's Bench on the 30th October 1819. I do not know what became of the case, but I subjoin a note which I have of the argument, as none of the arguments of counsel appear in print:

Sugden:—Devise of reversion is subject to the same rules as a devise of estate in possession. A limitation to take effect after the determination of issue generally at any time, without a previous estate to such issue, is void. Testator, a young man, could not intend to exclude any future child; therefore, he did *not* intend to devise *the actual reversion* under the settlement, for that would exclude daughters of sons, &c. Under the estates in the settlement, *and the reversion* if left undisposed of, all the issue of the testator would take. He tells you that the reversion he means to devise is a reversion expectant upon a general failure of issue. 1. Is there an estate tail by implication? 2. Is it a devise of a reversion expectant only on the estates in the settlement? I contend, 1. That it is an executory devise on a general failure of issue, and no implication of an estate tail. 2. Or a contingency on failure of issue at the testator's death, which contingency did not happen. As to estates by implication, Moor *v.* Parker, 4 Mod. 316, shows that estates by settlement and will cannot be tacked. Gardiner *v.* Sheldon, Vaugh. 259; Doe *v.* Roach, 5 Mau. & Selw. 482; Lanesborough *v.* Fox, For. 262; 3 Bro. P. C. 130; Jones *v.* Morgan, Fearne; 3 Bro. P. C. 323; Lytton *v.* Lytton, 4 Bro. C. C. 441; Tenny *v.* Agar, 12 East, 253. What estates, I ask, could be raised by implication? 1. To sons of the first marriage in tail. 2. To the issue of any subsequent marriage. What priorities would you give to them? Wright *v.* Hammond, 1 Str. 427; Goodman *v.* Goodright, 2 Burr. 873. The cases where the devise was confined to a failure of issue at the testator's death are in my favour; Romilly *v.* James, 1 Marsh. 98; Sandford *v.* Irby, 3 Barn. & Ald. 654; French *v.*

was affirmed in the House of Lords. Lord Eldon observed in the later case of Morse *v.* Lord Ormond (*e*) that Bankes and

(*e*) 1 Russ. 405; Egerton *v.* Jones, 3 Sim. 409; Eno *v.* Eno, 6 Hare, 171; Murray *v.* Addenbrook, 4 Russ. 407. See Doe *v.* Lucraft, 8 Bing. 386; and see now 1 Vict. c. 26, s. 29.

Caddell, 3 Bro. P. C. 257; Lytton *v.* Lytton, 4 Bro. C. C. 441; Wellington *v.* Wellington, 4 Burr. 2165.

Preston:—1. Lytton *v.* Lytton, and the similar cases, do not apply. Relies on Tenny *v.* Agar and Romilly *v.* James. The testator was aware of the settlement, and gave the reversion under it; Badger *v.* Lloyd, 1 Lord Ray. 523; Weale *v.* Lower, Poll. 66. 2. Estates tail rise by implication. The testator might have devised to heirs of his body; Mandeville's case, 1 Inst. 26, b. So it must be taken here; Litt. s. 352, 353, 354. Mode of performing condition to enfeoff feoffer, and the sons of his body after his death; Walter *v.* Drew, Fearne, 387; Goodright *v.* Goodrich, Willes, 369; Jones *v.* Morgan, Judges in favour of estate by implication. Pybus *v.* Mitford; Bean *v.* Hally, 8 T. Rep. Where in a devise all issue not being included, the tenant for life held to be tenant in tail under subsequent words; Attorney-General *v.* Sutton, 1 P. Wms. 754.

Sugden, in reply:—Lytton *v.* Lytton, &c. authorities for the plaintiff. He contemplated a failure of issue at his death. If Mandeville's case authorize a limitation to heirs of the body, why was not the estate raised in favour of Lord James by Lanesborough *v.* Fox? It would give the issue of the second marriage different estates to those limited to the issue of the first marriage, for daughters of sons of the second marriage would take before daughters of daughters.

In the House of Lords both Sugden and Preston appear to have been of counsel for the appellant in *support* of the will. The following are the heads of the argument of the former, which is the only one of which I have a note: 1. Devise of reversion. Daughters of sons of devisees excluded by will. The testator did not contemplate remote contingency of vesting; not future marriage; for wife residuary legatee and executrix. Certificate in Jones *v.* Morgan, Fearne, 453. Portions for persons *in esse*. 2. *Devise on the death of wife.* Such devises have been confined to testator's death. Wellington *v.* Wellington, 4 Burr. 2165; 1 Bla. 645. Testator was a bachelor, and died one. "In default of issue of my body." So French *v.* Caddell, 3 Bro. P. C. 257. Annuity given for life was made payable, the first payment on the 1st May or November, which should first happen after testator's death. "Default of issue, male and female, of his own body." Devise over in case of death generally after estate for life, confined to death in life of tenant for life. Russell *v.* Long, 4 Ves. 551. 3. Estate tail by implication. Co. Litt. 26, b; Litt. s. 352, 353; Tenny *v.* Agar, 12 East, 253; Romilly *v.* James, 1 Marsh. 592; Goodright *v.* Goodridge, Willes, 369. It is shown that where there is no devise the estate which the eldest son would

Holme he admitted to be a very strong decision. The words of the devise he said described an event that could not take place unless his sons all died without female issue as well as without male issue, and unless his daughters died without issue either male or female, and it was only upon that contingency that he devised his reversion. This reversion, however, was a reversion expectant, not upon a general failure of his issue, but upon estates which had been limited to the sons of the marriage in tail male, and to the daughters in tail general. Mistaking what his reversion was, he introduced a description of it which served to show what it was that he meant to dispose of, and what it was that he meant to do with that of which he could dispose. He stated that what he meant to devise was that which he was not entitled to devise unless there was a failure of all issue, and he did devise it in case of there being a failure of all issue. The House of Lords thought that inasmuch as he had stated in his will what the reversion was of which he thought himself entitled to dispose, and which was a reversion different from the interest which was actually in him, a court could not hold he meant to dispose of that which was the real nature of his reversion. Lord Eldon, therefore, it may

take by descent may be altered or restrained by implication in the same way as an estate expressly given. The circumstances of the testator and his family always taken into consideration in these cases. Lord Rosslyn, 4 Bro. C. C. 461. A second marriage and birth of issue would have operated as a revocation; Fearne, 591. Jones *v.* Morgan, Lord Mansfield clear for estate tail by implication; Fearne, 593. So Judges, and certificate confirmed, ib. 594. Estates by implication, as in Attorney-General *v.* Sutton, 1 P. Wms. 754. General intention; Lanesborough *v.* Fox, For. 262. Exchequ. and Exch. Ch. in Ireland in favour of the devise. *No recital there in will.* Lord James suffered a recovery. *If implication* admitted, remainders were barred. But tenant for 99 years only and remainder could not coalesce. How could issue take? Lady Lanesborough *v.* Fox had a great course of futurity in view: Per Lord Rosslyn; Lytton *v.* Lytton, 4 Bro. C. C. 459; 3 Bro. P. 130. Argued either estate tail or too remote. Lytton *v.* Lytton, 4 Bro. C. C. 441. First held void by Lord Northington, but supported by Lords Thurlow and Loughborough. The words were general, yet they were confined.

perhaps be inferred, doubted whether the decision which he directed was the correct one. The difficulty was to hold the devise as an immediate one of the reversion which might, in favour of collaterals, exclude whole lines of the testator's own issue. But the devise was of the reversion: he meant his estate to go in the events which happened to his devisees, and that intention might have been effected consistently with the rights of *all* the issue, and without doing violence to the words of the will or breaking in upon any rule of law by considering that the devises were to take effect immediately after the decease of his wife in case there should be, at that time, a failure of all his issue. But such was not the view taken of the case by Lord Eldon in the House of Lords (I).

12. We have a few cases more to refer to under this head. The first is the case of Candy *v.* Campbell (*f*), heard in the Court below as Campbell *v.* Harding (*g*) where the testator gave to his adopted daughter, Caroline, 20,000 *l.* Three per Cents. and his house and landed property, but in case of her death *without lawful issue*, he willed the money to be equally divided betwixt his nephews and nieces living at the time, and the land to nephews named. If the daughter

(*f*) 2 Russ. & Myl. 690.
(*g*) 2 Cla. & Fin. 421; 8 Bligh, N. S. 469; and see 1 Vict. c. 26, s. 29.

(I) Sanford *v.* Irby, 3 Barn. & Ald. 654 (where the limitation in the settlement was of course confined to the sons of the first marriage, although not so stated in the report), was decided before Bankes and Holme, and was in favour of the devise. In the late case of Egerton *v.* Jones, 3 Sim. 409, where the Vice Chancellor was of opinion in favour of a devise of a reversion incorrectly described, yet he said that it had always been his opinion that Sanford *v.* Irby was a strong decision. Bristow *v.* Boothby, 2 Sim. & Stu. 465, was affirmed by Lord Lyndhurst on appeal; see Ellicomb *v.* Gompertz, 3 Myl. & Cra. 151. I always thought it was wrongly decided. The estate was the wife's, and in the event in which her power was to arise would vest in her husband, although all the issue were not provided for by the settlement; the power therefore really was only to charge the reversion in the event of the husband's becoming entitled to it upon failure of the preceding limitations; it excluded no one. Upon the appeal it was insisted that Morse and Lord Ormond and Bristow and Boothby could not stand together.

married it must be with consent of her guardians, and the property to be solely settled *upon herself and children* and in no way alienated. It was directed by the Vice Chancellor, afterwards by the Lord Chancellor, and ultimately by the House of Lords, that the daughter took an absolute interest in the stock, and that the gift over was void as too remote.

13. As a fee cannot in real estate be mounted on a fee, so where the absolute interest is given in personal estate, there can be no further gift of it. Thus in Byng *v.* Lord Strafford (*h*), heard in the House of Lords as Hoare *v.* Byng (*i*), the testator gave to his wife all his personal estate (with a slight exception) for her life, subject to legacies; and he left to her all his landed estates for her life, and afterwards all his personal and landed estates to his eldest sister, for her life, and then to the eldest son of George Byng, and afterwards to his second, third, or any later son he might have by the testator's niece, and then to the eldest son and other sons successively of the Earl of Buckingham by another niece; but all then to be subject to the following payments and legacies, of which he gave several, and directed that if the legacies and conditions of his will were not complied with exactly, then he left all the advantages of it to the next person in succession, subject to these legacies, and so on, unless they were discharged, which direction he in substance repeated in many codicils, by which he gave additional legacies. George Byng had four sons living at the death of the testator. The testator, it was alleged, meant the real and personal estates to go together; the fee would not pass in the real estate, neither ought the absolute interest to pass in the personal estate: it was not given to the first son of George Byng absolutely, and the testator has expressly provided for a succession: the true construction therefore was to confine the sons to life interests. It was, however, decided, first by Lord Langdale, Master of the Rolls, and afterwards by the House of Lords, that the first

(*h*) 5 Beav. 558. (*i*) 10 Cla. & Fin. 508.

son of George Byng took the absolute interest in the personal estate, and that all the gifts over were void. Lord Lyndhurst, C., said that an absolute estate was given, and the will added that after the expiration or termination of that estate, then some other person should take. That estate never did terminate; then there was no other person who could take it.

14. In the case of Lady Jane Loftus *v.* Smyth (*k*), Thomas Loftus, on his marriage, settled his freehold estates, in the usual way, on his first and other sons successively in tail male, with remainder to himself in fee, and the estates were charged with 2,000 *l.* for younger children, to be paid as he should appoint, and with power to him to charge 1,000 *l.* for additional portions. He had an only son, Dudley, and three daughters born in his lifetime, and a fourth daughter born after his death. By his will he provided 10,000 *l.* for his daughters; and he charged his settled estate with 3,000 *l.* for his younger children's portions, and his unsettled property with 7,000 *l.* in order to make up the 10,000 *l.* And he directed, in case his son Dudley should die before he should attain 21 years, or marry, and should leave no issue male of his body lawfully begotten, and that the testator should have no other son to inherit his estate, then his will was that his daughters should have the sum of 15,000 *l.* for their portions, to be equally divided between them, with an interest of five per cent. yearly, from the time of his death or failure of such his issue male: all the said portions to be raised by sale or mortgage of his real estate by his executors and trustees, in case his personal estate should not be sufficient. The will was unattested. By a codicil he gave 3,000 *l.* to the child of which his wife was *enceinte*. The son married, and left his wife and two daughters surviving him, but no issue male. It was decided by the Lord Chancellor in Ireland that the additional portions, amounting to 5,000 *l.*, were payable. Against this decree there was an

(*k*) Printed Cases, D. P. 1825. I was of counsel for the appellant.

appeal to the Lords, and the principal reasons were because it was the testator's intention only to give an increased portion to his daughters, in the event of his son's dying under age, without leaving issue male; and in favour of that construction, Fairfield *v.* Morgan, 2 New Rep. 38 (I), and other cases were quoted; and because the bequest was too remote, being limited to take effect only in case the testator should have no other son to inherit his estate, which showed the testator's intention that his daughters should not take the additional portion, so long as there was issue of any of his sons capable of inheriting the testator's estates. For the respondents it was urged that it was the manifest intention of the testator, and was the express provision of the will, that in the event of there being no issue male of his son Dudley or himself, the fortunes of his daughters, the respondents, should receive an increase. The provision in the will in substance was, that if the son should die under 21 (in which case the testator did not contemplate his being married), or although he should attain 21, and marry, yet if he should even in that case die without having issue male, and the testator should have no other son, the fortunes of the daughters should be increased. This was the construction of the will according to the letter, and the literal construction here would make the will operate according to the testator's natural and obvious intention, which was, in the event of his estate going from his own issue male by their failure, it should bear an additional burden for the benefit of his daughters. The event in which the portions of the daughters were to be increased was not too remote; it

(I) The case of Fairfield *v.* Morgan, referred to in the text, was decided in the House of Lords, assisted by the Judges, in 1805. The testator gave all his real estates to his brother; but in case he should die before he attained 21, *or* without issue living at his death, the testator devised his estates to his mother for ever. The brother attained 21, and afterwards died without issue. It was held that *or* meant *and*, and that the estate did not go over to the mother. See Denn *v.* Kemeys, 9 East, 366; Eastman *v.* Baker, 1 Taunt. 174; Hasker *v.* Sutton, 1 Bing. 500; Right *v.* Day, 16 East, 67.

was not after an indefinite failure of issue of Dudley, but in case he should *leave* no issue male of his body lawfully begotten (I), which, according to the settled legal construction, means, in case he should not leave issue male living at his death. These latter reasons prevailed, and the appeal was dismissed and the decree affirmed.

VIII. Of intermediate rents and interest and resulting trusts:

1. In several of the cases which we have already considered, questions have arisen as to the right to the rents or interest where the gift is either executory or void as too remote; and it may therefore be convenient here to state the points decided on that head, to which may properly be added the cases on resulting trusts.

2. In Duffield *v.* Elwes (*l*), where the gift was held not to vest till a child attained 21, it was decided that the intermediate rents passed under a devise of the residue of the testator's property, &c., and it was considered that it would not have militated against this construction had the residue been given in trust for sale, for although it would be a strange direction to apply to property of this nature, yet where the language is plain and explicit, if this interest were withdrawn from the residuary clause the testator's language would not be construed but contradicted (*m*). Where there is no gift of the residue, as whilst the estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates or the rents; such estates descend to the heir (*n*).

3. So if estates be limited in the usual way in strict settlement by will, with an ultimate remainder in fee, and

(*l*) 2 Sim. & Stu. 544; 3 Barn. & Cress. 705; 1 Dow, N. S. 268, 395; 3 Bligh, N. S. 260; *supra*, p. 300.

(*m*) 1 Dow, N.S. 400, 401; 3 Bligh, N. S. 340.

(*n*) 1 Dow, N.S. 310, 311; 3 Bligh, N. S. 329.

(I) "And that I shall have no other son to inherit my estate," &c.

with a shifting clause which operates whilst a tenant for life has no son to take under the limitations, the intermediate rents will not go to the remainder-man in fee, but will pass under a residuary devise. This is the case of Morris *v.* Sandford (*o*). The testator devised his freehold estates to James for life, with remainder to trustees and their heirs during his life to preserve contingent remainders, with the usual trust; remainder to his first and other sons successively in tail male, with remainder to the right heirs of Herbert for ever, with a proviso that if the tenant for life should become entitled to certain settled estates, his estate under the will should cease and determine, with a like proviso as to a tenant in tail becoming entitled, for determining his estate tail; and in either case the estates devised were immediately to go over to the person next in remainder under the limitations aforesaid, in the same manner as the person so next in remainder would take the same by virtue of the will, if the person so becoming entitled being tenant for life were dead, or being tenant in tail were dead without issue male. And the testator gave his copyhold estates to a trustee in fee upon such trusts, &c. as would best and nearest correspond with the uses and trusts of his freehold estates. And as to the residue of his real and personal estates, he gave the same to three devisees, their heirs, executors, administrators, or assigns equally. After the testator's death the tenant for life became entitled to the settled estates referred to in the shifting clause, and he had no male issue. It was decided by the Vice Chancellor, and that decision was affirmed by the House of Lords, that the rents of the copyhold estates from the time the tenant for life became entitled to the other settled estates to the time of his decease, or until he should have male issue, passed by the residuary devise to the three devisees. The House of Lords gave no

(*o*) 11 Cla. & Fin. 667; 11 Sim. 260; 12 Sim. 615, *nom.* Morrice *v.* Langham, 8 Mees. & Wels. 194.

opinion as to the rents of the freeholds, because they were devised under a power in a settlement, and the rents were claimed by persons provided for by that settlement; and the questions were confined to co-defendants, as between whom, in the existing suit, there could be no decree.

4. In the case of Ackers *v.* Phipps, which we have already fully discussed (*p*), the Vice Chancellor holding, upon the second devise, that the devisee did not take a vested estate, was of opinion, as there was no trust for accumulation of the rents, that they belonged to the heir-at-law in the meantime. Lord Brougham, C., appeared also to think that the devisee had only a contingent interest, yet he thought that the heir-at-law was excluded from taking the intermediate rents: the House of Lords, therefore, reversed the decree below as to these rents. The gift, we may remember, was of the residuary real and personal estate, and there was a trust for accumulation of the personal estate. This was a mixed fund, and therefore, according to Genery *v.* Fitzgerald (*q*), the intermediate profits of both ought to go together. It was insisted that here there was no residuary clause independent of the contingency. The Lord Chancellor appears to have been at first inclined to decide the case upon such cases as Amphlett *v.* Parke, and Durour *v.* Motteux, but ultimately he said that the gift, though it was not vested, yet was a gift that displaced the heir in respect chiefly to the residuary gift of real and personal estate, but in respect also, as strengthening that inference, to the intention of displacing the heir-at-law in favour of the devisee, and which intention he thought was clearly made out from the circumstances of the case.

5. Although a charge be created upon an estate which in event cannot go to the uses intended, upon the ground of their being too remote and void, yet the devisee of the estate itself cannot claim the interest carved out of it where the

(*p*) 5 Sim. 63, 64; 3 Cla. & Fin. 665, *supra*.
(*q*) Jac. 468.

devise to him is after raising of the charge, but it will go to the heir-at-law. This was decided in the case of Tregonwell *v.* Sydenham, already fully stated (*r*), where the trust to raise 20,000 *l.* under the term of 60 years was held valid and subsisting, although it could not go to the persons intended by the testator, upon the ground of remoteness. The Court of Exchequer held the trust void altogether, so that the devisee of the estate would have taken discharged of the 20,000 *l.*; but the House of Lords reversed this decree, and held the heir-at-law to be entitled to the fund, because the trusts for raising the money and laying it out in the purchase of lands were legal, and there were no words by which the next devisee could take till the 20,000 *l.* had been raised (*s*).

6. But where a testator gave an estate to trustees upon trust to sell, and out of the monies to arise by sale to pay (amongst other sums) 5,000 *l.* to his wife (in part satisfaction of 10,000 *l.* secured to her by their marriage settlement in case of her surviving him, and failure of issue of his body by her,) and after the several payments aforesaid, in trust to lay out the residue of the monies to arise as aforesaid in the funds, &c., which he gave to certain legatees: his wife died in his lifetime, and it was held by Richards, C. Baron (*t*), and by the House of Lords (*u*), affirming his decree, that the purchase monies were discharged from the 5,000 *l.* for the benefit of the legatees. Lord Redesdale and Lord Eldon, C. both considered that the testator must be deemed to have known that his gift was subject to lapse, and must be supposed to have looked at this contingency for the benefit of those persons to whom he gave the residue of the money to arise by sale of the estate (*x*). The claim of the heir, therefore, to the 5,000 *l.* did not succeed. This decision seems

(*r*) 3 Dow, 194; *supra*, p. 326; and see 12 Price, 307.

(*s*) Baker *v.* Hall, 12 Ves. 497, was not cited. I prefer the decision of the Court of Exchequer.

(*t*) Noel *v.* Lord Henley, 7 Price, 241; Daniel, 211.

(*u*) Noel *v.* Noel, 12 Price, 214. See now 1 Vict. c. 26, s. 25.

(*x*) See 12 Price, 300, 318.

to have overruled the case of Hutchison *v.* Hammond (*y*), which was relied upon by the appellants. According to my own note of the argument, Lord Eldon, C., during the argument put the case of legacies being given, and then the residue of the purchase monies: suppose there to be no personal estate, the legacies would lapse into the residue. This was admitted by Shadwell. The Lord Chancellor added that the gift was of sums of money and of *legacies* all in one clause.

7. Where a testator gave large legacies to his illegitimate children and their mother, to be raised and levied from his properties by his executors, to be thereafter in his will named, and bequeathed a freehold estate to a son of his uncle, and the remainder of his properties he devised to his executors, to make good the above sums, and the following sums which he enumerated (the legatees being an old servant and relations, including his uncle, who was his heir-at-law); and he appointed three persons his executors, and guardians of the fortunes of his children; and he ordained, appointed, and devised the said three persons (again naming them) executors to his will, also his residuary legatees, share and share alike. Lord Manners, C., held that the real estate passed to the executors, but as a fund only in aid of the personalty, to pay the debts and legacies, and that there was a resulting trust for the heir-at-law (*z*). And this decree was affirmed by the House of Lords, as Lord Eldon and Lord Redesdale could not say that the decision was wrong, although they could not say it was right (*a*).

8. We may here, perhaps, introduce the case of Noel *v.* Noel (*b*), before referred to on another point. The testator, in addition to other sums, directed the trustees, out of the monies to arise by sale of the estate, to pay and discharge

(*y*) 3 Bro. C. C. 128.

(*z*) Kellett *v.* Kellett, 1 Ball & Beat. 533.

(*a*) 3 Dow, 248. This is hardly a satisfactory mode of deciding a case in the ultimate court of appeal.

(*b*) 12 Price, 214; *supra.*

the sum of 20,000*l.* then due, with interest upon mortgage of certain parts of his settled estates, which he had before devised in strict settlement, and all interest that should be due at his death, or should become due until payment thereof, and all costs which should be incurred in the releasing the mortgaged premises therefrom; and also to pay so much and such part of such other of his debts, and of the other pecuniary legacies by him afterwards bequeathed, as his personal estate not thereinafter specifically bequeathed should not extend to pay and satisfy; and he directed the residue of the monies to arise by sale to be invested, and gave the same to certain legatees. And after giving various specific and pecuniary legacies, all the residue of his personal estate and effects, if any there should be after payment of such of his debts as were not therein otherwise provided for, legacies and testamentary expenses, he gave to his wife for her own use. The 20,000*l.* was not a personal debt of the testator's; the wife, as we have seen, died in the testator's lifetime. Richards, C. B., held that the personal estate was the primary fund for payment of the 20,000*l.*, but that was reversed in the House of Lords. The Chief Baron was of opinion that the claim set up by the heir-at-law to the benefit of the 20,000*l.* could not be maintained. The counsel for the heir-at-law particularly relied upon the case of Tregonwell *v.* Sydenham. The learned Judge considered the 20,000*l.* as a debt of the testator's (*c*); he thought that there was a personal exemption only, of which, as the wife died in her husband's lifetime, there was no one to take advantage. He appears to have misunderstood the frame of the will (*d*), which was, 1. To direct particular debts, and the 5,000*l.* to

(*c*) But see 7 Price, 263; and see 12 Price, 328.

(*d*) See Daniel, 232, 233; 7 Price, 259; and see it explained by Lord Eldon, 12 Price, 319. It is observable that in both of the passages of the judgment of the Chief Baron in which the words of the will are quoted, the important word "*other*" of his debts, &c. is omitted. See Daniel, 230, 232.

be paid out of the purchase monies. 2. To direct payment out of such monies of such *other of* his debts and other bequests as his personal estate should not extend to pay; and, 3. To give his residuary personal estate to his wife after payment of *such* of his debts as were not therein otherwise provided for, and of his legacies. He said that he could not make any distinction in his own mind between a direction that real estate shall be chargeable with a particular debt of 20,000*l.*, and a devise of real estate, subject to all the testator's debts, for the 20,000*l.* was only part of those debts (*e*). But still he thought that the 5,000*l.* to Lady Wentworth was excluded out of the personal estate; and he thought would, if she had lived, have been raisable out of the real estate only. Lord Redesdale thought the decree wrong in both views. 1. The 20,000*l.* was not the personal debt of the testator. 2. If it had been, still the 20,000*l.* should have been paid out of the purchase monies; for if it had been payable in the first place out of the personal estate, that would have been a question between the testator's heir-at-law and his next of kin; for the persons who claimed the residue of the purchase monies would not have any right to the 20,000*l.*, but that sum must result for the benefit of the heir-at-law, as part of his real estate, not given to the persons who claim the benefit of that provision, as to the estate directed to be sold. It was clear by the context of the will that the testator meant that the 20,000*l.* should, under any circumstances, and in any event, be paid out of the produce of the estate directed to be sold, and out of no other fund, if the produce should be sufficient for that purpose. The appellant's counsel relied, amongst other authorities, upon the case of Hancox *v.* Abbey. Whether the House of Lords would have reversed the decree on this point if the debt had been properly the personal debt of the testator does not appear. The Lord Chancellor rested on

(*e*) See Hancox *v.* Abbey, 11 Ves. 179; Bateman *v.* Lord Roden, 1 Jo. & Lat. 356; Dickin *v.* Edwards, 4 Hare, 273.

the fact that the debt was not properly a personal debt of the testator. It appears to the writer that even if it were, the decree in the Exchequer was erroneous.

9. Here we may notice a case where a testator had two estates, *A* and *B*, and had mortgaged *A* separately, and then *A* and *B* jointly, and by his will, gave *A* to trustees to sell, and gave to them all other his real and personal estates upon trust, to sell and convert the same, and to stand possessed of such monies as might arise from the sale of *A* or otherwise after payment of all his debts, funeral, and testamentary expenses, upon trust for certain persons. And the testator gave *B* to his partner for all his term therein. The purchase monies for *A* were exhausted in payment of the first mortgage, and the second mortgage was paid out of the general personal estate, which the Chief Baron held to be a right application, but the legatees of the general fund insisting that the estate *B* went to the partner, subject to the incumbrance, or at least that he ought to bear a proportionate part thereof, appealed to the House of Lords, where the decree was affirmed, with 50*l.* costs, without observation (*f*). This was a specific gift, and the debt was the personal debt of the testator, and therefore upon the general rule, the legatee had a right to have the incumbrance paid off out of the general personal estate. Besides, here all the debts were to be paid out of the mixed fund before any of the pecuniary legacies were payable (*g*).

10. Lastly, we may here mention the case of Lord Stair *v.* Macgill (*h*), which although a Scotch case, was decided upon principles common to the laws both of England and Scotland. The produce of certain real and personal estates, *and interest and proceeds thereof*, were directed by deed and will to be laid out in land, to be annexed to the testator's entailed estate, and the House of Lords, considering that

(*f*) Davies *v.* Bush, 4 Bligh, N. S. 319, n.
805.

(*g*) See the cases in 4 Bligh, N. S.

(*h*) 1 Dow, N. S. 24.

the testator meant all to take equally, held that from the period of 12 months after the testator's death the heir in tail was entitled to the interest of the money not laid out in the purchase of land, and in favour of this intention the direction to lay out the interest and proceeds of the fund was disregarded.

IX. Of estates by construction or implication:

1. We have already considered where cross-remainders are raised by implication, and it remains only to state the great case of Newburgh *v.* Newburgh—which has already been referred to on one point—(*i*), where an estate for life was raised by construction in favour of the devisee, although no such estate was expressly devised to her, and the later case of Langston *v.* Pole.

2. Lord Newburgh, who had under his marriage settlement the reversion in fee in estates in Sussex and Gloucester, expectant upon failure of issue male by his then Countess, subject to a jointure rent-charge of 500*l.* a year to the Countess out of the Sussex estates, and to portions for younger children out of the Gloucester estates, but had no issue, devised his Sussex and Gloucester estates to trustees for 2,000 years. And [as to the said estates in the county of Sussex with their appurtenances immediately] after the expiration of the term of 2,000 years, and as to his estates in the county of Northumberland, from and after his decease he gave "the same several estates" to his wife for life in satisfaction of the said 500*l.* per annum, with remainders over in strict settlement to his sons and daughters by any after-taken wife in tail male and in tail general, "and in default of such issue as to all such of my estates hereinbefore derived as are situate in the said several counties of Sussex and Gloucester," to uses in strict settlement for life and in tail in favour of

(*i*) *Supra*, p. 197, 206. See Shuldham *v.* Smith, 6 Dow, 22; *infra*.

different branches of his family; and the testator provided "that the several persons thereinbefore by him made tenants for life or in tail male of his real estates thereinbefore devised in the said counties of Sussex and Gloucester, except the said Countess of Newburgh," should take the name and arms of Kemp. The trusts of the 2,000 years' term were declared to be to raise certain sums in aid for payment of his debts and legacies and to secure certain annuities, and upon trust "immediately after the death of the Countess of Newburgh to raise out of the said estates in the counties of Sussex and Gloucester 2,000 *l.*, with interest to be computed from her death," and pay the same to a legatee. And the testator provided "that the Countess of Newburgh during her life, and after her decease the several persons who by virtue of the limitations thereinbefore contained should for the time being be entitled to the actual freehold of the said estates in the said counties of Sussex and Gloucester, or the actual freehold of the said estates in the said county of Northumberland," should have power to grant leases. And the testator gave unto trustees, their heirs, &c., all his freehold, copyhold, and leasehold estates not before disposed of, and all his personal estate, to sell and convert into money and to pay his debts and legacies, "except the 2,000 *l.* charged on his estates in Sussex and Gloucester," and subject thereto in trust for the Countess. The ultimate order of Sir John Leach, V. C., was that Lady Newburgh, the widow, should be at liberty to bring an ejectment to try her title to the Gloucester estates. From this decree there was an appeal to the House of Lords: the case was heard with the assistance of the Judges, as to the reception of parol evidence to insert the word Gloucester in the will, and that was, as we have seen, declared to be inadmissible (*k*). Lady Newburgh by her cross bill charged that there was sufficient even on the face of the will to manifest the testator's intention to give her an estate for life in the estates in the county of

(*k*) *Supra*, p. 197.

Gloucester, or that the estate passed under the residuary devise; but the principal ground put forward was the equity to have the mistake in omitting Gloucester supplied. That was the main prayer of the bill, and it prayed in the alternative, in case the Court should refuse to correct such mistake, a declaration that the Gloucester estates passed under the residuary devise in the will. It was but faintly argued that Lady Newburgh took a life estate under the will as it stood; but the House of Lords declared that by the true construction of the will (as the same appeared in writing) Lady Newburgh was entitled to an estate for life in the testator's real estates in the county of Gloucester, subject to the term of 2,000 years created by the will, with like good and valid estates in remainder in the said estate in the county of Gloucester as were by the will expressed as to the testator's estates in the county of Sussex (*l*). The intention, we may observe, was manifest from the context of the will: the devise of the Sussex and Gloucester estates as one property, in default of his own issue, and by way of regular remainder over; the exception of Lady Newburgh in the direction that tenants for life, &c., of the Sussex and Gloucester estates should take the name and arms; the postponing of the raising of the 2,000 *l.* out of the Sussex and Gloucester estates until after Lady Newburgh's death; and the power of leasing to Lady Newburgh for her life;—all these provisions showed that the testator intended his wife to take the Gloucester as well as the Sussex estate for life: in favour of the intention, therefore, the words between brackets, which it was said were introduced by mistake, might be read as an imperfect enumeration of the estates comprised in the term, or might be rejected altogether as surplusage, or as inconsistent with the rest of the will. The case in this view is one of great importance.

(*l*) 23 January 1825, MS. The decree of the Lords is hardly known to the Profession. This accounts for the statement by a learned and popular writer that Lady N. lost the Gloucester estates by the mistake.

3. The later case of Langston *v.* Pole was of the same nature, although not so difficult to manage, nevertheless there was a great difference of opinion upon the case amongst the Judges (*m*). The testator devised his estates to trustees in fee, upon trust when his son attained his majority to convey the same to the use of the son for life, with a limitation to trustees to preserve contingent remainders, with remainder to the use of the second, third, fourth, fifth, and all and every *other* son of his son to be begotten, successively one after another as they should be in seniority of age and priority of birth, in tail male, the elder of such sons and the heirs male of his body to always take before the younger of such son or sons and the heirs male of his and their body and bodies; in short, there were *regular* limitations to all the sons of the son successively in tail male, omitting only the first son, as it appeared before the Court somewhat irregularly, by a mistake of the copying clerk. These limitations were followed by a limitation to trustees for 500 years, with, in remainder, regular limitations to the son's first and other daughters successively in tail, remainder to trustees for 99 years, with like remainders successively to the testator's several daughters for life and to their sons in tail male, and after an interposed term of years to their daughters in tail, with the ultimate remainder to his sister in fee. There were in all eight terms of years, including those of 500 years and 99 years. The trusts of the 500 years' term were to raise portions for younger daughters of the son, "in case there should be no son of the body of his son," &c., in the usual way. The trusts of the 99 years were to raise portions for the testator's younger daughters, "in case there should be no son or daughter of the body of his son," &c. The trusts of the six other terms were in like manner to raise portions and sums, only in case (in addition to other failures of issue) there should be no son or daughter of the body of his son,

(*m*) 2 Cla. & Fin. 194; 8 Bligh, N. S. 167.

&c. And the testator directed that power should be given to his son, "in case there should not be any child or children of his body begotten other than and besides an elder or only son," to charge portions for any one, two, or more of his younger sons or daughters; and like powers were to be given to his daughters. The testator was thus his own conveyancer, although the trustees were to make the settlement, and it was of course agreed that the will must be construed precisely as if the uses had been limited by the will itself, so as to carry the legal estate (1). It will be observed that the whole frame of the will was adapted to a regular limitation in tail male to the first and other sons of the son. The question was whether the first son of the testator's son took an estate in tail male under the will. Upon a case directed to the Court of King's Bench, the three Judges who heard the case certified that he did not take any estate under the will (*n*). Sir John Leach, Master of the Rolls, sent the same case to the Common Pleas, and the Judges of that court certified their opinion to be that the first son took an estate in tail male under the will expectant on the death of his father, the testator's son (*o*), and the Master of the Rolls confirmed their certificate (*p*). He thought it manifest that the testator did not mean to exclude the first son. How, he asked, was the provision for the daughters, in case there should be no issue male, consistent with no limitation to the first son? Upon an appeal to the House of Lords, Lord Brougham, C., agreed with the view taken by the Common Pleas and acted upon

(*n*) 9 Dowl. & Ryl. 298. (*o*) 5 Bing. 228.
(*p*) Taml. 119.

(1) That was the opinion of Lord Gifford and of Sir John Leach; 12 Cla. & Fin. 209. Lord Brougham, C., treated it as an executory trust; 12 Cla. & Fin. 244, 249; nevertheless his opinion would have been the same had it been a legal limitation. It could not, however, be maintained that this was such an executory trust as would enable the Court to put any other construction on the will than a legal limitation must have received.

at the Rolls. He considered that a mistake appearing on the face of the will was a legitimate ground in construing an instrument. The framer of the will knew how to exclude an eldest or only child in express words in the trusts of the several terms of years when it was intended. The existence of a son was to defeat the trusts of eight terms of years, and yet that son, whose existence was to produce such an effect, was not, it was argued, to benefit under it in the slightest degree. Like the Master of the Rolls, he relied upon the power to the son to charge portions for his younger children. If there were one son and one daughter, the portion (if the son were excluded) would be charged on the daughter's estate for the behoof of that daughter herself. It was said that the word "other" in the limitation meant "younger," "posterior," and so it did where you had before enumerated first, second, third, and fourth, but where as here the limitation was to the second, third, fourth, and other sons, "other" there, *ex vi termini*, included the first, because the first was literally the one who answered the description of something other than the second, third, and fourth. The decree at the Rolls was affirmed.

X. Of gifts to parents and children: where the latter take *per stirpes* and not *per capita*.

1. In Odell *v.* Crone (*q*), the testator gave his residuary real and personal estates unto his eldest son Robert, and his, the testator's, two daughters, and all their younger children, their heirs, executors, administrators, and assigns for ever; but his intentions were that Robert should receive the entire interest of such part of his real and personal fortune as he intended for Robert's younger children during his life, and he repeated the same declaration as to each of his two daughters. And in case any of his three children should die, the share of his child so dying, if such child should

(*q*) Dow, 61; 2 Ball & Beat. 449.

leave younger children, should go to the younger children of such child; but if any of his said children should so die without having any younger children, the share of his child so dying should go to the survivors or survivor of his other children and their younger children, share and share alike. And the testator gave power to his son and two daughters to distribute amongst his and their respective children such parts of his real and personal fortune as such younger children respectively might be entitled to under his will; and in failure of such distribution, that all his said children and grandchildren should have equal shares of the residue of his real and personal fortune; and further, that in case any of his said grandchildren should happen to die under their respective ages of 21 years, or days of marriage, the shares of such of them as should so die should remain to the brethren of the child or children so dying. At the death of the testator (I) Robert had one younger child, one of the daughters had nine younger children, and the other had none. Lord Clare, C., decreed that the three children of the testator, and his and their younger children *in being at the time of the testator's death*, were respectively entitled in equal shares to the residue, subject to the power of distribution in the will. The effect of this was agreed between the three children to be that the property was to be divided into 13 shares, two of which were to go to the son and his younger child, ten to one of the daughters and her nine younger children, and one to the other daughter who had no child.

2. This decree appears to have proceeded upon the ambiguous expressions in the latter part of the will, rejecting the manifest intention shown by the previous devise and directions, and it wholly, without reason, excluded younger

(I) Lord Eldon, C., following Lord Manners, C., 2 Ball & Beat. 480, stated that this was the state of the family *when the will was made*; 3 Dow, 68; but at that period, although Robert had one younger child, neither of the two daughters had any younger child.

children born after the testator's death. After this decree other children were born of the son and of the daughter who at the time the decree was pronounced had no child: these children filed a bill, submitting that they were entitled to a share of the residue, and that the same ought to be divided into three shares, each to be enjoyed by the son and two daughters for their respective lives, and afterwards to be distributed amongst their respective younger children, whether born before or after the testator's death. And so it was held by Lord Manners, C., after an elaborate opinion delivered by Lord C. J. Downes. The parents, it was observed, took clearly for life only, and therefore *all* their younger children were entitled to take. As to the shares, the parents were to take everything that their respective children were to succeed to, and it was impossible at the death of the testator, and still was, that the number of the latter could be ascertained; the numbers then of the grandchildren could form no clue to ascertain the proportions which the parents were to enjoy. But all the subsequent clauses, applying equally to all the children of the testator, showed that equality among them was intended: no distribution was made among them, and when it was considered that each branch of his family, consisting of parent and the respective children, were equally favoured, this naturally called for equality of distribution amongst the testator's own children. And it was held, that the family should take *per stirpes*, each stock taking equally, the parent for life, the children afterwards taking the parent's share: this was proved to be the intention of the testator, by the distribution not being of the whole at any one time, but of each child's share at the death of that child, the testator calling the provision made in succession for each branch of his family the share of such child, and thus appointing a taking *per stirpes*. And this decree was affirmed in the House of Lords.

SECTION IV.

OF RECOMMENDATIONS AND CONDITIONS; OF GIFTS IN RESTRAINT OF MARRIAGE, AND OF SUBSTITUTIONARY GIFTS.

I. *Of recommendations and conditions:*

1. *Recommendation inoperative in general against absolute gifts.*
2. *Wright* v. *Atkyns: devise in fee, in the fullest confidence devisee will devise the property "to my family," equitable tenant for life only, impeachable of waste.*
3. *Argument on the first appeal.*
4. *Lord Redesdale's opinion.*
5. *Decree reversed as far as it confined devisee to an estate for life.*
6. *New bill filed to restrain waste: Lord Eldon gave a restricted power, subject to account.*
7. *Second appeal: decree reversed: devisee to have full right to cut timber.*
8. *Speeches in the House of Lords.*
9. *Observations on the case.*
10. *Meredith* v. *Heneage: devise unfettered and uncontrolled, not bound by expression of testator's full confidence and firmest persuasion devisee would devise the estate in manner pointed out.*
11. *Knight* v. *Boughton: devisee in fee not bound by testator's declaration that he trusted to the justice of his successors to continue the estate in a certain male succession.*
12. *Shaw* v. *Lawless: direction to trustees and tenant for life to continue the testator's agent in that office operative.*
13. *Decree reversed by the House.*
14. *Of conditions.*

II. *Of gifts in restraint of marriage, and of substitutionary gifts:*

1. *Commissioners of Charities* v. *Harris: marriage, with consent, under false name; gift over.*
2. *Observations on the case.*
3. *Judgment in D. P.*
4. *Consent required of persons named to marriage does not extend to representatives of survivor.*
5. *Bequest to sons and their issue; sons take for life, remainder to their children.*
6. *Reversed in D. P. on the intention: gifts substitutionary.*
7. *Observations on the judgment in D. P.*

I. Of recommendations and conditions:

1. THE law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute

gift, has in late times varied from the earlier authorities. In nearly every recent case, the gift has been held to be uncontrolled by the request or recommendation made, or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule, that if a testator really mean his recommendation to be imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a considerable struggle.

2. In Wright *v.* Atkyns (*a*), the testator gave all his leasehold, freehold, and copyhold estates, or of whatever tenure or tenures, unto his mother, Charlotte Atkyns, and her heirs for ever, in the fullest confidence that after her decease she would devise the property to his family; and he charged the premises with the payment of his debts, and he gave to her all his personal estate, and appointed her his executrix. The testator left his uncle his heir-at-law. Sir W. Grant, Master of the Rolls, said that it was admitted that the words "in the fullest confidence" that she would devise the property, were sufficient to create a trust if there were no uncertainty in the object. He held that there was no uncertainty, but that it was a trust for the testator's heir; therefore Mrs. Atkyns was to be considered as tenant for life of the estate, and an injunction was subsequently awarded against Mrs. Atkyns by Lord Eldon, restraining her from cutting down any trees or committing any other waste. Lord Eldon refused to dissolve the injunction; he had not the slightest doubt that the testator did not mean that his wife should be impeached for waste, but he could not avoid the construction that her heir-at-law would be a trustee for his heir-at-law, and then the consequences must attach. This sort of trust, he added, was generally a surprise on the intention, but it was too late to correct that. The effect of the will reducing the estate to a tenancy for life, the consequence seemed to follow: he had endeavoured to raise a distinction in the wife's favour, and could not.

(*a*) 17 Ves. 255.

He did not believe the testator intended a mere trust, but that must be the construction if the word "family" was properly construed (*b*). Upon an appeal, Lord Eldon, C., appears to have assumed that the words were sufficient to create a trust if the object were certain; to which point he confined his observations, commenting upon the difficulty occasioned by the gift being of leasehold as well as real estate; but ultimately he affirmed the decree at the Rolls (*c*), at the same time rather inviting a re-hearing, or an appeal to the House of Lords (*d*). Some years afterwards it was determined to appeal, in order at least to establish Mrs. Atkyns' right to the timber, which was of great value. The principal reasons for the appellant, which were signed by the late Sir Anthony Hart and the writer, were, because Mrs. Atkyns was, under the will, tenant in fee, and not merely tenant for life, and the confidence reposed in her did not create a trust, or if it did create a trust, it was a trust for the descendants of the testator generally, and not for the heir-at-law only, and because if by the construction of the will Mrs. Atkyns was in equity bound to leave the estates at her death to the testator's family, yet she was, to the extent of her beneficial dominion over the fee, entitled to all the rights incident to an owner in fee simple, and ought not to be considered as bare tenant for life, impeachable of waste. The reasons for the respondent were signed by the late Lord Gifford and Sir Charles Wetherell, and were, 1. Because the expressions in the will created a trust by which the appellant was bound to devise the property after her decease to the person or persons designated by the words "my family," and the only person who in law answered to that designation was the testator's heir. 2. That by the expressions in the will the appellant was made simply tenant for life in equity, and therefore was impeachable for waste.

3. I have a note of the heads of my own argument for the

(*b*) 1 Ves. & Bea. 313. (*c*) 19 Ves. 299.
(*d*) Coop. 111, 125.

appellant, but none of the learned arguments of the other counsel. The cases upon direct gifts to a family were quoted as regards real estate. Chapman's case, Dy. 336, the Judges were divided. "House" was explained by the proviso. Hob. 133, Crossley *v.* Clare, Ambl. 397, express devise. Sir Thos. Clarke said that where the devise is to the stock or to the family, the Court confirms it to the head of the family, and he gives the reason that otherwise the devise would be void, and he cited Chapman's case. Doe *v.* Smith, 5 Mau. & Selw. 126: the devise was to my sister *C.*'s family, *to go in heirship* for ever, and eldest son took. But here the gift is of leasehold, freehold, and copyhold. Lord Eldon stated that the testator's not having any leasehold estate made no difference, for by his mentioning that she may dispose of leasehold estates, you must take him to have the same intention as to leasehold as to freehold estates, Coop. 123; and the same observation applies to copyhold estates, for after purchased copyholds surrendered would have passed by the will. Now, either the devise here is void altogether, or if not, whether this is considered as a case of real estate or of personal estate, or of a mixed fund, the construction is against the heir-at-law, for here the testator could not mean simply a gift to his heir-at-law, but the mother had a power to devise the whole property to his family. In Doe *v.* Over, 1 Taunt. 263, a devise of real estate "to the relations on my side" (I) was held to include all who would take personal estate under the statute, by analogy to the decisions on personal estate. So here. The respondent's first reason admits a power to devise, but says that the respondent answers the description. Considered as a case of a mixed fund, Pyot *v.* Pyot, 1 Ves. 335: Real and personal estate "to her nearest relations of the name of the Pyots, and to *his or her* heirs for ever, goes to

(I) The Chief Justice in delivering judgment in this case said, that perhaps the strongest argument against the devise was, that it was uncertain. Gibbs, Richards, and Preston, had all given opinions that the devise was void for uncertainty. See Thomas *v.* Thomas, 3 Barn. & Cress. 825.

the nearest relations. Lord Hardwicke dwells upon the fund being mixed. In the case cited in Doe *v.* Over, 1 Taunt. 266, "under a limitation to the family of J. S., the real estates descend to the heir-at-law, the personal estate goes to the next of kin." This proves our case. In Gwynne *v.* Muddock, 14 Ves. 488, the *nighest heir-at-law* took both the real and personal estate, on the ground of the testator's intention not to divide the property. Barnes & Patch, 8 Ves. 604: Real and personal estate to be *equally divided* between brother Lancelot's and sister Esther's *families*, the children took *per capita*. In Heneage *v.* Lord Andover (*e*), two of the Judges held that the devisee took absolutely, one that he took as a trustee for the heirs, and the other that he took as a trustee, but with a power of selection. There it was to heirs. Sir W. Grant thought in this case that the rule did not apply to mixed devises; 17 Ves. 261, 262, 263. Lord Eldon said that supposing there to be only one relation, he must take, therefore here heir must take; but this does not follow if this is regarded as a gift of personal estate: In M'Leroth *v.* Bacon, 5 Ves. 159, upon the context, a power to appoint for the benefit of a married woman's family was held to include the husband. Crewys *v.* Colman, 9 Ves. 319: To sister *B.* for life, declaring that it was her absolute desire that *she bequeath to those of her own family* what she has power to dispose of, provided they behave well to her. *B.* did *not* execute the power, and it was held to be a trust for the next of kin of *B. at B.'s death*. That is inconsistent with this decree. But this as a trust is void altogether. Harland *v.* Trigg, 1 Bro. C. C., 142: leaseholds for lives given to uses of prior devise of real estates, "all other leaseholds to John Harland for ever, *hoping he will continue them in the family.*" Lord Thurlow: The objects must be distinct; when there is a choice it must be in the power of the devisee to dispose of it either way. The words do not clearly demonstrate an object: it was held not to be a trust. Heneage

(*e*) *Infra.*

v. Lord Andover. Here, is the power to devise to be struck out? There is no previous case of a power to appoint to the family. How could she devise to a dead heir? Suppose there were coheirs? As to copyholds, they might be held of different manors with different customs, gavelkind or borough-English, for example. The power could only be executed by will. Suppose the freeholds to be of little value and the personal estate of great amount, and the heir to be a remote one and the next of kin a near one? All is given to the wife and her heirs, but the leaseholds notwithstanding would not go to her heirs: therefore, 1, the leasehold; 2, the freehold; 3, the copyhold; 4, or of whatever tenure or tenures, must go beneficially according to the law. Harding *v.* Glyn, 1 Atk. 469, vests in relations *at the death* of the donee of the power. Lord Eldon's opinion, 1 Ves. & Bea. 314. In regard to the question of waste, Mrs. Atkyns is tenant in fee up to the moment of her death. There is no pure case of an adult devisee in fee with an executory devise over being restrained. Bridges *v.* Stephens, 2 Swanst. 150; Williams *v.* Williams, 15 Ves. 419, 429; Buckworth *v.* Thirkill, Coll. Jurid. No case of executory devise. There is no instance of a bill in such a case in the life of a devisee in fee upon such a trust. Suppose trees blown down. Stat. of Marlebridge, c. 24, prevents tenants from committing waste unless authorized to do so. Coke, 2 Inst. 145, states that the mischief before the statute was that against lessees for life or years there lay no prohibition of waste at the common law, because they came in by act of the lessor, and he might have provided upon the making of the lease against waste, and he that might and would not provide for himself, the common law would not provide for. Stat. Gloucester (6 Ed. 1), ch. 5, 2 Inst. 299, extended the remedy. Robinson *v.* Lytton, 3 Atk. 209, 1 Dick. 210: devise to one in fee with an executory gift over if he died under 21 without issue, an injunction granted against cutting timber *whilst son under* 21. Stansfield *v.* Habergham, 10 Ves. 273: there being an interim

resulting trust in equity for heir, the injunction was granted. That is clearly distinguishable. Here there is no relief under the statutes at law, and no ground for the interference of equity.

4. Lord Redesdale delivered an elaborate opinion against the decree. The following is an abstract, which I made for the second argument, of the points in the speech.

The persons entitled cannot be ascertained till Mrs. Atkyns's death. They are to take under Mrs. Atkyns's will. The construction of the *heir* (who takes without the will) is to give the will no meaning. Words of confidence struck out by plaintiff's construction; [Then devise to Mrs. A. stands absolute]. Meaning of "my family." No case decided that "my family" means heir-at-law. Chapman's case. Distinction between — 1. Direct devise; 2. Devise to a person with power. Harding *v.* Glyn, *now the settled law.* Testator meant the Atkyns family, and not his mother's family. 1. Either family implies a class who can come within the description of the family of Mr. Atkyns; or, 2. The words are uncertain. Do not mean heir-at-law. In default of appointment the persons living at Mrs. Atkyns's death are to take. Mrs. Atkyns not tenant for life only. Will only controls the power of her disposition after her death. As to waste: She can only be restrained by declaring her only tenant for life. But that is contrary to the words of the will, therefore Lord Redesdale cannot coincide with that declaration. Mrs. Atkyns is tenant in fee, bound by a confidence, to be executed by her devise, upon her death. With respect to the objects of the disposition at her death, she is as much an owner of the estate as Mr. Atkyns was. She is not, therefore, impeachable of waste. Words equal to a devise, without impeachment of waste, *i. e.* according to statute of Marlebridge, it is equivalent to a special grant that she may do it, because it gives her an absolute property, during that period, which no person has a right to control. Robinson *v.* Lytton. Question ought

not to be prejudiced, no person being before the House properly to contest it. Those persons are those capable under a will executed by Mrs. Atkyns, whenever that may be. There may be no such persons. Decree to be reversed, without prejudice to any question which may arise touching the construction of the testator's will, *on the death of Charlotte Atkyns*; leaving it open till her death. Court may hold the words only recommendatory. Injunction partially to be reversed, and liberty to apply to Lord Chancellor.

5. The decree was reversed, so far as it declared that Mrs. Atkyns was only tenant for life, without prejudice to any question which might thereafter arise, touching the construction of the testator's will, and the order for the injunction, *so far as it was founded on the declaration that Mrs. Atkyns was only tenant for life*, was reversed; and Mrs. Atkyns was to apply to the Court of Chancery, as she might be advised, touching such injunction, or any other ground. There being no remaining incumbrance on the estate, Lord Eldon, C., dissolved the injunction, upon the application of Mrs. Atkyns.

6. The person who was the testator's heir-at-law at his death was dead, and it was insisted that the power was gone. His devisees, and the heiress at law *of the original testator* filed a bill, not praying any declaration of rights, but praying for an account of timber sold, and an injunction; and Lord Eldon, C., gave Mrs. Atkyns power to cut timber in an husbandlike manner, giving an account, and paying the money into Court (*f*). The Lord Chancellor considered that a devise "to my family" had been held to mean the heir-at-law (*g*). If there was any title in the plaintiffs, it was under a trust. Did the trust as to the property include every stick of the timber? Here "my family" means not the heir-at-law, but a class; it was difficult to say that the trust was certain, on account of different lines of heirs. Was the estate taken from the heir-

(*f*) Turn. & Russ. 143.

(*g*) It was said there was no such case.

at-law merely to give it him back? He would have taken as a purchaser, and not by descent. He must give a certain meaning to "*my family*," or they are void. Executory devise, now that Robinson *v.* Lytton was removed, was clear. Uncertainty of object to take under power, and in default of appointment, afforded an argument against the intention to limit Mrs. Atkyns's rights of enjoyment. Harding *v.* Glyn was the necessary construction, For as the power was to be executed amongst persons living at the death of the donee, and the gift was only by implication from the devise, it must be to the persons capable of taking under the devise, if one had been made (I). But it

(I) The above I find in my own handwriting, and I think that it must have been abstracted from a short-hand writer's note. The following is the short note which I took of the judgment: Lord Chancellor states alleged grounds of title on the other side. Shifting right from one heir to another. Bill states intention to *destroy*, but you can only proceed upon what is *proved*. Original foundation of equitable waste. This is not like Raby Castle. Here Mrs. Atkyns only claims right to cut down timber like tenant for life, *sans waste*. If she is entitled to cut to that extent, that is contrary to Sir W. Grant's declaration in his decree, that she was only tenant for life. I found it difficult to make up my mind, but the tendency of my opinion was that his Honor was right. I could not however make out that Mrs. Atkyns was only tenant for life. States cases of confidence where they are equal to trusts. Doubts of meaning of *family*. I felt it difficult to say that Master of the Rolls was wrong as to trust. This case, 1. Either legal estate in fee, clothed with a trust which calls upon her to leave the property as she took it; 2, or power; 3, or condition. 1. Plaintiffs must show that they have a title. There is no demurrer. I entertain doubt whether there is any plaintiff here to sustain the suit. Harding *v.* Glyn, and Hands and Hands (which last is weakened). In Harding *v.* Glyn the plaintiffs were to take by devise from the wife. So power—or condition. I give no opinion whether trust, power, or condition. But if plaintiffs have a right to file a bill, can they restrain her from cutting in a husbandlike manner? This is a mere question of intention. Mrs. Atkyns is tenant of the legal fee; but if there is a clear intent, the rights and incidents may be cut down: Robinson and Lytton, and other cases, prove this. States the circumstances of Robinson *v.* Lytton. There the estate was under the direction of the Court, and it was in the discretion of the Court whether the timber should be cut or not. So Garth *v.* Cotton. Authority of Court doubtful down to that case. Harland *v.* Trigg. Lord Thurlow's opinion depended upon intent as collected from the will. It will come hereafter to be a very serious question whether this case

appears (*h*) that Lord Eldon considered there could be no doubt that the *words* were imperative in the case before him. He expressed his opinion to be that Mrs. Atkyns might cut timber, as owner of the fee, but still he made the order which has been stated.

7. This order was considered to be in direct opposition to the principle upon which the House of Lords reversed the decree, and thereupon the unusual step was taken of a second appeal to the House in the same Session. The appellants repeated their original principal reasons, but the respondents found it necessary to change their ground. They now insisted that the expressions in the will created a trust either in favour of the heir-at-law at the testator's decease, or his heir-at-law at the decease of Mrs. Atkyns, or in case a power of devising was thereby given to her, such power in the events that had happened was gone, or she was bound to devise the same to the person answering the description of heir-at-law of the testator at her decease; and in the meantime the inheritance was vested either in the person at present answering the description of his heir-at-law, in case Mrs. Atkyns was then to depart this life, or in the devisees of the heir-at-law of the testator at his decease: they still submitted that Mrs. Atkyns was only tenant for life or in equity a trustee of the inheritance, and therefore should not be allowed to destroy or impair the same. The judgment of the House of Lords declared that according to the true construction of the testator's will, the

(*h*) Turn. & Russ. 157; see Sale *v.* Moore, 1 Sim. 537; Benson *v.* Whittam, 5 Sim. 26; Lechmere *v.* Lavie, 2 Myl. & Kee. 197; Winch *v.* Brutton, 14 Sim. 379; White *v.* Briggs, 15 Sim. 17.

will not be open to the same observation. For as the person is to take under the combined operation of the will of the testator and the will of Mrs. Atkyns, it is difficult to say the heir is to take. If she made a will, giving to the younger brother of the testator, he leaving two, I will suppose, for life *sans* waste, remainder to his children, would not that be a devise to the family. And yet if she can give to a tenant for life *sans* waste, is she to take a less interest. It depends upon intention only.

intention of the testator must be taken to have been to give to the appellant a right to cut the timber for her own use, and therefore the order for the injunction was reversed without prejudice to any question which might arise touching any right in Mrs. Atkyns to make any disposition of the fee simple of the freehold, and the absolute interest in the copyhold and leasehold estates in question, in consequence of any words contained in the will importing any restraint on her disposition thereof, and without prejudice to any question whether the respondents or any of them had any right to institute this suit.

8. The following is the short note which I took of the speeches delivered by Lord Redesdale, Lord Erskine, and Lord Eldon, C.

"*Lord Redesdale* states the case. Sole question whether they have a right to restrain her from cutting timber. 1. Insisted that the devise to her is absolute. States cases of confidence following too strictly the civil law, which depended upon a different rule of property. Not imperative, where the objects are uncertain, or the thing is uncertain. Here persons very inaccurately ascertained. *His family.* First, law words must have their effect, and subsequent imperfect words cannot overrule them. Not now right to consider precise meaning of *my family*. Mrs. A. has at law the fee. It may be said, subject to a condition; but that cannot be fully decided till her death. No person has now, or during her life can have, more than a *possibility* of benefit; for the person taking must take by her devise, and must be living at her death. It is argued that the words, *my family*, restrain her power, but do not benefit the family, for they say, family means *heir-at-law*. That is to defeat the whole will. He would take against the will, and by descent. The plaintiffs are in contradictory interests. The claim of the present heir, except as one of the family, is quite absurd. She must claim as heir through the heir at the testator's death. Serious questions, there-

fore, as to the right of the plaintiffs to sustain the suit. They have a possible interest; but have they a transmissible interest (*h*)? But I do not think it necessary to decide this point. Bill filed, and injunction granted under limits. It therefore assumes that she has no right to cut timber. That must be the foundation. The order, it is said, does Mrs. A. no injury. Is this no injury, to have the profits locked up during her life? How is she to order her affairs, or to dispose of her property? Although the question cannot now be decided as to the fee simple, yet with respect to the enjoyment of the property during her life, she has a right to have her rights declared. She cannot be enjoined, unless it is clear that she has not the right. The interests of the family are exposed by the will to the chance of the value of the timber not being forthcoming, if ultimately the right should be decided against Mrs. A. Supposing the words to be inoperative, yet the interest vested in Mrs. A. is precisely the same as if the gift was upon condition. In case of such a condition the property remains in the party till the condition is to be performed, and if it becomes impossible, the fee remains. So here, if there should be no person answering the description of my family at her death, she will be entitled to the fee against the heir-at-law, for the heir-at-law is disinherited by the will. Timber was not originally considered as part of the estate, so that any person not taking an estate by operation of law might cut down the timber until prevented by statute law. States the reason. Statutes prove that timber was not incident only to the inheritance. Mrs. A. having the fee-simple in the estate during her life—the tenant to the *præcipe*—no person to call in aid—and any legal decision against her could not be questioned by any third person; she is not within the meaning of any statute against waste. Gift for life, *sans* waste, he may cut down timber. The *property* in the timber is in him, and the relief given by the statute does not apply to

(*h*) See and consider White *v.* Briggs, 2 Phill. 583.

him. Clearly of opinion, whatever construction be put on the confidence clause, Mrs. A. has power to cut timber, and the order is wrong, for it restrains her power over the estate. Can one have a doubt of the testator's intention in giving her the fee, to give her all the rights and enjoyments during her life of a tenant in fee? Under subsequent words the persons are to take by *her* devise. They take out of *her* fee-simple, which fee-simple is only controlled by the condition. They say she is to devise the *property* as it is. Then she is to devise more than she takes, for they say she takes no interest in the timber. She is to give to them by her will more than she takes by herself. States Lord Barnard's case. Suppose Mrs. A.'s object had been mere *distribution*, that would have been quite a different question. Hands *v.* Hands, a case of personalty. Cited his own MSS. That case proves that the learned Judge had not the full possession of his faculties Professes great respect for him. Decree never drawn up; no doubt because if it had, it would have destroyed the testator's intention. Robinson *v.* Lytton: states it. Lord Hardwicke's opinion. Gore *v.* Gore, a mere doubt. The Court might consider the heir as only taking the undisposed interest for a chattel interest. States Hopkins *v.* Hopkins. No pretence for saying, that this lady can be restrained from cutting timber.

"*Lord Erskine.* Not necessary to consider what interest *family* have. The question is, what are the rights of Mrs. A. herself *during her life?* Can this estate, in fee-simple, be cut down to an estate for life?

"*Lord Chancellor.* Considering the principles of Sir W. Grant's decision, your present opinion cannot be reconciled with his. His declaration, that Mrs. A. was only tenant for life cannot be sustained. But he must have thought that, in every view, Mrs. A. was not at liberty to cut timber. I cannot state that the matter passed in my mind without considerable doubts about Mrs. A.'s life estate; indeed,

further, I then thought that there were obligations imposed on her which would prevent her from cutting timber. Upon the last hearing, I admitted that I, as well as Sir W. Grant, was wrong. I admit that the present order does do harm to Mrs. A."

9. Thus ended for the present this severely contested case. It was impossible to maintain according to the original decree, as affirmed by Lord Eldon, that Mrs. Atkyns was tenant for life only; but Lord Eldon long adhered to his original view; even after the first reversal in the Lords, the restricted liberty which he gave to cut timber was grounded upon his original opinion. Lord Redesdale in truth overruled Lord Eldon's opinion, and decided the case, and he was of the same opinion upon the hearing of the first appeal as he was upon the hearing of the second (*i*). His appears to have been the correct view. The House established Mrs. Atkyns's right to cut timber for her own benefit; it was therefore decided by the House that under such a devise as this, assuming that the devisee may be bound to devise the estate according to the confidence reposed, or that in default of appointment it will go to the object designated by the testator, yet in respect of enjoyment, all the rights and incidents of property remain in the devisee during her life, to the extent of the estate vested in her. The great question was left undecided, viz. whether a trust was created, and for whom. It was treated as clear that the words were sufficient to raise a trust if the objects were clearly ascertained. The result of the investigation seems to show that it will be difficult to maintain that the will clearly points out objects in whose favour the trust can be enforced. At all events it cannot now be held consistently with the opinions already expressed and acted upon by the House, that the trust was for the testator's heir-at-law at his death, and that the widow was a bare trustee, and had no power of appointment or of selection.

(*i*) See Llo. & Goo. temp. Sugd. 163, 164.

10. This case was followed by the case of Meredith *v.* Heneage (*k*), where the testator gave all his real estate to his wife, her heirs, and assigns for ever, and all his personal estate to her, her executors, administrators, and assigns for ever. And he earnestly recommended to his wife the care and protection of his affectionate friend, Arabella Pigott, most heartily beseeching his wife to permit her to reside with her, and to afford to her the same kind attention and tenderness which had been always shown her in his life-time. And he earnestly and warmly entreated his wife at her decease to settle and assure to two trustees such part of his real estate as she should think proper for the special purpose of securing to Arabella Pigott during her life (in case she survived his wife) such an income as would enable her to enjoy all those comforts of life which she had been accustomed to, leaving the amount of such income to the entire discretion of his wife. "And I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth unto my said dear wife (and which she must acknowledge not to be inconsiderable) unfettered and unlimited, in full confidence and with the firmest persuasion that in her future disposition and distribution thereof, she will distinguish the heirs of my late father by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference;" and he appointed her his sole executrix. No question arose upon the direction as to Miss Pigott, although it was much relied upon in argument, to prove that the testator did not intend his confidence to be a trust. The testator's widow devised the estates in strict settlement in favour of some of the testator's descendants, not being the testator's heirs at law, either at his own death or at the death of his widow. The

(*k*) 10 Price, 306; Printed Cases, D. P. 1824. I argued the case for the appellants; heard below *nom.* Heneage *v.* Lord Andover, 10 Price, 230; see White *v.* Briggs, 15 Sim. 33.

case came before the Court of Exchequer, and the Judges differed in opinion, but by the majority the trusts of the widow's will were established; in other words, it was decided that the gift to the widow was absolute and unfettered by any trust. This was the opinion of Richards, C. B., which was elaborately pronounced: he founded his opinion upon the ground that though he held himself bound by the decisions, yet it was not his duty to extend the rule of construction, and to add to the number of cases, where the Court appeared to him rather to have made than to have given effect to wills of testators. He thought it clear that the clause as to Miss Pigott was not imperative. Strong as the words, I devise, &c., in full confidence and with the firmest persuasion, &c. were, as regards the father's heirs, yet connected with the other words, he doubted whether they did more than only import a wish, and not impose a command. He thought it inconsistent that a gift declared to be unfettered and unlimited should be construed to be fettered and limited. As to the persons to take, if there were a trust the Chief Baron thought that if real estate only had been disposed of, the heirs at the time of the widow's death would have been entitled the one of them, if there should be more than one, to be preferred to the other or others at the option of the widow. But as the personal estate was given as the real estate was, he could not tell who would be entitled to both the real and personal estate, the heirs at law of the father (as the objects to take the personal as well as the real estate), or the heirs and next of kin, or the next of kin only. If the objects were not certain, there was no trust imposed upon the widow (I). Mr. Baron Graham thought the words, "full confidence," were synonymous with trust, and tantamount to saying, I give it in trust. He thought the objects were the heirs of the testator's father at the death of the

(I) Garrow, B., concurred entirely in the opinion and reasoning of the Chief Baron.

widow, in favour of whom the power might have been exercised. Mr. Baron Wood thought that the trusts of the widow's will ought to be established, but upon a different ground from that taken by the Chief Baron. He thought that a trust was created: he did not think that the words "unfettered and unlimited" excluded the idea of any trust as to the objects. He thought that if it had been the testator's intention to confine his wife's selection to his father's next or nearest heirs he would have said so; but he thought the testator meant, by the generality of expression, to give her the selection out of all the existing heirs or descendants of his father, whether immediate or remote, as a class of persons from whom she was to select, which was tantamount to saying, all the descendants from my father. He considered, therefore, that the widow's will was a good execution of the power or trust vested in her, and he thought that the disposition of the real estate must stand good whatever became of the personal estate. Upon these divided opinions the trusts of the widow's will were established by the decree of the Court, from which there was an appeal to the House of Lords, where the appeal was dismissed and the decree affirmed. The case was argued at great length, and every authority cited. It amounts to a decision that clear words of gift to a devisee for his own benefit, free from control, shall not be cut down by subsequent words which may operate as an expression of a desire without disturbing the previous devise. It was one of the most embarrassing cases that ever called for a judicial decision.

11. In the later case of Knight *v.* Boughton (*l*) the testator had been tenant in tail of a portion of his real estate under a settlement and will made by his grandfather, and by suffering a recovery he had acquired the fee. By his will (I) he 1st. gave all his estates, real and personal, to his

(*l*) 11 Cla. & Fin. 513; 3 Beav. 148, *nom.* Knight *v.* Knight.

(I) The dispositions are not numbered in the will.

brother Thomas should he be living at the time of his decease, and if not, to his son Thomas the younger, and in case he should die before the testator, to his eldest son, or next descendant in the direct male line; and in case he should have no such descendant in the direct main line, to the next male issue of his said brother, and his next descendant in the direct male line; but in case that no such issue or descendant of his said brother or nephew should be living at the time of his decease, to the next descendant in the direct male line of the testator's grandfather, according to the purport of his will, under which the testator had inherited those estates which his industry and abilities had acquired, and of which therefore he had the best right to dispose, subject to certain gifts to the poor. 2. And the testator appointed the person who should inherit his estates under his will his sole executor and *trustee*, to carry the same, and everything therein contained, duly into execution, confiding in the approved honour and integrity of his family, to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property, according to the plain and obvious meaning of his words: he accordingly gave some small annuities to old servants. 3. And he gave his collection of imitative art, &c. to the British Museum, on condition that, within one year after his decease, the next descendant in the direct male line then living of his abovenamed grandfather should be made an hereditary trustee, to be continued in perpetual succession to his next descendants in the direct male line, as long as any should exist, and in case of their failure, to the next in the female line. 4. He concluded: "I trust to the liberality of my successors to reward any others of my old servants and tenants, according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my abovenamed grandfather." The testator's brother survived, and the question

raised was, whether he was bound to make a strict settlement of the real and personal estates. The Master of the Rolls, with much doubt, after a minute investigation of the will, held that the directions in the will were not imperative. He referred to the admissions made by former Judges, that by interfering in such cases, the Court has sometimes rather made a will for the testator than executed his will according to his intention; and the observation showed the necessity of being extremely cautious in admitting any, the least extension of the principle to be extracted from a long series of authorities, in respect of which such admissions had been made. He observed that there was no doubt (under No. 4) of the wish, or of the line of succession in which the testator desired the estates to devolve or to be transmitted; but he dwelt upon the distinction which the testator made in trusting to the liberality of his successors for one purpose, and to their justice for another. In the first part of the sentence it left an indefinite discretion with the successors; and it was difficult in the latter part to consider the word used in a sense which imposed an absolute obligation. The Master of the Rolls doubted whether the subject was sufficiently certain for a trust of this nature. The objects did appear to him to be indicated with sufficient certainty, and it seemed to him clear in what order he wished them to take; but unless they were to take successively, as absolute owners, he could not discover what estates they were intended to take (I). From this decision there was an appeal to the House of Lords, where, upon the opinion of Lord Lyndhurst, C., and of the three law Lords, the decree was affirmed. It was observed by the Lord Chancellor that the clause (No. 4) was not confined to his immediate successors, but was without limit; as he must have known that such an injunction could not be imperative on his successors generally, he must have meant it a mere

(I) See the form of settlement suggested by Mr. Humphry, of counsel for the appellants, 11 Cla. & Fin. 535 n.

suggestion, applicable in the same way to his immediate as to his more remote successors, and not intending thereby to fetter their discretion as to the disposal of the property. The uncertainty what property was intended, whether the personal as well as the real estate were included, or whether the real estates formerly of the grandfather alone were intended, and the silence of the testator as to the nature of the estate to be taken in the property, were circumstances also relied upon by the Lord Chancellor.

12. An earlier case was decided in the Court of Chancery in Ireland, to which the same principle was applicable, although the direction was confined to the manner in which the devisee should manage the estate. This is the case of Shaw *v.* Lawless (*m*): the testator devised his real estates to W. J. Turbett and Edward Beere, to the use of his friend William Shaw (then aged about 20 years), for life, *sans* waste, with remainders over in strict settlement: he bequeathed 100 *l.* to his friend and agent B. E. Lawless as a token of his esteem for him; he gave 150 *l.* to the poor, which sum he *directed* should be paid by his executors to his agent the said B. E. Lawless, to be by him distributed amongst them in such manner, &c., as he should deem most advisable. "And it is also my particular desire that my said executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend Mr. Shaw, when he shall enter into the receipt and perception of my said rents of, &c. (naming the lands), shall continue the said B. E. Lawless in the receipt and management thereof, and likewise shall employ and retain him in the receipt, agency, and management of the rents and issues of such other lands and premises as shall and may be purchased and settled in pursuance of the directions thereinbefore contained, at the usual fees allowed to agents, he having acted for me since I became possessed of said estate fully to my satisfaction." And he further bequeathed a sum of 150 *l.* to his friend and agent

(*m*) 5 Cla. & Fin. 129. Printed Cases, D. P.

B. E. Lawless, to purchase and erect a monumental tablet. And the testator directed that until William Shaw should attain 21, Robert Turbett and James Turbett (being two of the executors named in his will), and the survivor of them, and the heirs and assigns of such survivor, should receive the rents and invest the same (save such part as should be applied towards his maintenance and education, and as should be requisite to pay certain annuities charged on the land), so as to accumulate during William Shaw's minority, to be paid to him at 21, or if he should die under 21, to form part of the residuary personal estate; and he gave the residue of his personal estate unto James Turbett and Edward Beere, to be laid out in land, to be settled to the former uses, and he appointed Robert Turbett, James Turbett, and William John Alexander, executors of his will. Shaw having attained 21, dismissed Lawless from the agency, and a bill filed by the latter to establish his right was dismissed by Lord Plunket, C., with costs. There could, he said, be no doubt that when the testator expressed his "desire" that Lawless should be continued as agent over the estate after his death, he meant he should be continued on the same footing as he was employed by himself, that is to say, subject to be removed at pleasure, whenever the party should think fit either to substitute another person in his place or to act as his own land agent, if he thought proper to do so. Such a right as that claimed would be attended with monstrous inconvenience to the owner of the estate, and therefore unless there were necessary words coercing the Court to do so, it could not hold the conferring of such a right to have been in the testator's contemplation (*n*). Upon a re-hearing before Sir Edward Sugden, C., he reversed the decree and established Lawless's right of agency (*o*). He referred to the confidence placed in Lawless as evidenced by other parts of the will. On the abstract point of law he had no difficulty; the words were

(*n*) Llo. & Goo. t. Sugd. 164 [n]. (*o*) Ib. 154.

quite sufficient to raise a trust; the person was certain, the subject certain, and the amount to be paid certain. He referred to Heneage *v.* Lord Andover, and Wright *v.* Atkyns(*p*), and admitted that those decisions showed that if the property was given absolutely and without restriction, you cannot lightly impose upon it a trust upon mere words of recommendation or confidence. Lord Plunket, he observed, appeared to have considered it as a question of convenience or inconvenience, and to have held that as the clause admitted of two constructions, one of which led to inconvenience and the other not, he was bound to take that which led to no inconvenience. He thought that the testator meant a benefit to Lawless: he thought it clear that it was imperative on the trustees during the minority of Shaw or of his issue, if he had any, to employ Shaw, and he could not say that a different right was vested in Shaw by the same words. He considered the direction in the nature of a condition imposed on the tenant for life, who was bound to perform it: a man may devise an estate under any condition he pleases, provided it be not an illegal one; and he considered Tibbets *v.* Tibbets, 19 Ves. 656, and Hibbert *v.* Hibbert, 3 Mer. 681, as authorities in favour of Lawless's claim.

13. Upon an appeal from this decree to the House of Lords the decree was reversed, and Lord Plunket's decree restored. The case was elaborately argued. Upon Tibbits *v.* Tibbits and Hibbert *v.* Hibbert being referred to, Lord Plunket observed that in those cases the Court thought the intention of the testator was clear. His difficulty here was, as to what really was the testator's intention. Lord Cottenham, C., speaking in his own name, and in that of Lord Brougham, treated the case as if the nature of an agency was altogether changed, because the party was bound to appoint a particular person as agent: Lawless therefore would have an equitable charge on the legal estate of Shaw,

(*p*) *Supra*, p. 376.

and Shaw would not have the direction of his own estate. As an equitable incumbrancer, he might file a bill to control the application of the personalty. The absurd extent to which this construction of the will necessarily led made it doubtful how far this could possibly have been the intention of the testator. In Hibbert *v.* Hibbert the words were clear and express in Humphrey's favour, though the estate to which they applied appeared doubtful. *In Tibbits v. Tibbits there was no doubt as to the subject matter, but still that case carried the doctrine of creation of trusts further than any which had preceded it, though as it seemed to him not so far as the present case had carried it.* He concluded by stating that he had examined all the cases, and that they were all against the construction contended for by the respondent. We may observe that Lord Plunket's original reason seems a better one in support of his decree than the reasons upon which the decision in the House of Lords was grounded: for the nature and character of the office of agent was not changed because the testator had pointed out who should be agent, nor would any such absurd consequence have followed as that Lawless could have filed a bill to have the personal estate invested: his right as agent, as to the land to be purchased, would commence when the land was purchased, and not before. Several cases were referred to in the argument where agents had been expressly appointed by testators. Hibbert *v.* Hibbert was an example, and there the testator only directed Humphreys to be appointed an agent; yet as he had no other estates than West India estates, Sir W. Grant held that as the testator meant a benefit to Humphreys, he should have the benefit of being appointed a consignee, thus going even beyond the words of the will, to give a benefit to an agent. Tibbits *v.* Tibbits seems to have been doubted. It was of course not denied that the testator, in the case under consideration, might have made it imperative on Shaw to appoint Lawless agent. Had he done so, each

would still have had the distinct right given to him by the testator. Shaw would still have been the legal and equitable tenant for life, but under the restriction to employ Lawless as an agent, and Lawless would have been agent simply, and subject of course to be removed if he conducted himself improperly (*q*). The only distinction between him and any ordinary agent would have been that he could not be dismissed without cause, whilst agents in general can be discharged whenever their principals think fit. The testator himself did not cease to be owner in fee of the property from the time he purchased it in 1818 until his death in 1829, although during the whole period he employed Lawless as his agent; nor did the trustees fail to execute their trust properly, although they employed Lawless as their agent from the testator's death until Shaw attained his majority. But this does not decide the question whether the testator *intended* his direction to be imperative, which the House of Lords determined he did not (I). In a later case in the Court of Chancery the Lord Chancellor observed that in Lawless *v.* Shaw the House of Lords laid it down as a rule, which he had since acted upon, that though "recommendation" may in some cases amount to a direction, and create a trust, yet that being a flexible term, if such a construction of it be inconsistent with any positive provision in the will, it is to be considered as a recommendation, and nothing more. In that case, he added, the interest supposed to be given to the party recommended was inconsistent with other powers which the

(*q*) Llo. & Goo. t. Sugd. 172, 173.

(I) There were the opinions of several eminent counsel who differed upon the point. Mr. O'Connell had had a consultation with Sir Edward Sugden when at the bar, to consider whether Lawless should appeal to the Lords against the original decree, and the latter counsel told the parties that he thought the decree wrong, but that he advised them not to appeal, as he did not think that the decree would be reversed. This had entirely escaped the memory of the Chancellor when the cause was reheard, but it probably led to the rehearing.

trustees were to exercise, and those powers being given in unambiguous terms, it was held that as the two provisions could not stand together, the flexible term was to give way to the inflexible term (*r*). This may not be thought a very accurate statement of Lawless *v.* Shaw (I). The case to which the Lord Chancellor referred as one in which he had acted upon the doctrine in question was the recent case of Finden *v.* Stephens (*s*), which was a weaker case than Lawless *v.* Shaw, in favour of the claim of a person to be

(*r*) Knott *v.* Cottee, 2 Phil. 196.
(*s*) 2 Phil. 142; 1 C. P. Coop. 318.

(I) There were no words of recommendation in this case; it was an expression of the testator's particular desire. It does not appear in what respect the interest supposed to be given to Lawless was inconsistent with other powers which the trustees were to exercise. The Lord Chancellor, in his speech in the House of Lords, observed, with reference to the alleged rights of Lawless, that the trustees were during a considerable part of the time to have not only the management of the estate which the testator devised, but were authorized and directed to lay out part of the personalty in the purchase of other lands. This is probably the portion of the will to which the Lord Chancellor intended to refer; for two of the executors were authorized to receive the rents during Shaw's minority. But this clearly meant a receipt through Lawless; for the desire expressed in the will was that his executors, whilst acting in the management of all or any of his affairs under his will, and also Mr. Shaw, *when he should be entitled to enter into the receipt and perception of the said rents* of his estates, should *continue Lawless in the receipt and management* thereof, and should also employ and retain him in the receipt, agency, and management of the rents and issues of all such other lands as should be purchased and settled in pursuance of the directions thereinafter contained. The residue of the personalty was given to two persons (one being a trustee and the other an executor), as trustees, to be laid out in land. From these provisions it would seem to be clear that although the persons named were to receive the rents, yet it was to be through Lawless as their agent, and they acted upon that construction. The direction to continue Lawless applied to both the trustees and Shaw. The testator saw no inconsistency in this; for he directed Shaw, when entitled to enter into receipt of the rents, to *continue* Lawless in receipt of them. Whether he intended his desire to be imperative or not, he meant Lawless to be continued as agent from his own death. The direction to lay out the personalty in lands could not be deemed inconsistent with Lawless's power as agent; and although two of the executors were to receive the rents during the minority, yet that was in the character of trustees.

appointed agent: the claim was allowed by the Vice Chancellor, but his decision was reversed on appeal by the Lord Chancellor (I).

14. As to devises upon condition. We have already seen where the attaining 21, or the giving of security to pay charges, is not a condition precedent, and to those cases we need now only refer (*t*).

II. Of gifts in restraint of marriage, and of substitutionary gifts:

1. As to gifts in restraint of marriage. In the case of the Commissioners of Charitable Uses *v.* Harris (*u*) the testator, after directing the investment of his personal estate, directed his trustees to permit his eldest son Thomas to receive, out of the interest of the funds, one moiety half-yearly while he strictly adhered to the solemn obligation he had entered into never to associate with or have any further knowledge of Ann Robinson. And the testator declared that the said restriction was not to be considered in full force until after his son's departure abroad, for the purpose of preventing the continuance or renewal of such connexion, provided it should be within three months after the testator's decease; and that if it should fully appear that at any

(*t*) *Supra* (p. 286, 291.) (*u*) Printed Cases, D. P. 1830, 1831.

(I) In a later case, White *v.* Briggs, 15 Sim. 33, the testator gave his consumable articles, linen, china, &c. entirely to his wife's use, and together with all her jewels, trinkets, clocks, watches, and ornaments, might be finally appropriated as she pleased, with the sum of 4,000*l.* in money. This sum, however, he recommended her to divide in sums which he specified, amongst persons whom he named. The Vice Chancellor said that in Meredith *v.* Heneage the objects of the recommendation were uncertain, but here both the objects and the subjects were certain, and he therefore thought a trust was created. Lord Lyndhurst, C., held otherwise, on the ground that the words "to be finally appropriated as she pleases," applied to the 4,000*l.* as well as to the jewels, &c., and therefore the case was governed by Meredith *v.* Heneage.

time after that period he should happen to break through the said engagement, all benefit that it was intended he should derive under his will should cease, and the property so bequeathed to him should go as thereinafter directed as in case of his dying unmarried and without issue. And the trustees were to permit his youngest son James to receive the remaining moiety of the said interest, and upon trust to pay to each of his said sons, on their respective days of marriage (such marriage to be with the consent of his trustees), the full amount of a moiety to each of them of the money funded. And in case either of them should marry without such consent, or should die without having married with such consent, then the interest of the moiety to which the person so marrying or dying was entitled, should go to the other or surviving brother during his life, and after his death the principal sum to go to his lawful issue (if any) as he should by deed or will appoint. And in case both his sons should so die unmarried and without leaving lawful issue, then the testator gave two successive life interests in the funds to other persons, and ultimately the capital to the Carlow Infirmary. And the testator appointed his trustees to be sole judges of the future conduct of his sons, and they only were to decide on what might amount to forfeiture of the benefit to be derived under his will. After the testator's death, Thomas, with the consent of all the trustees, married Mary Ann Madden, who really was Ann Robinson, and he received a moiety of his father's property. It afterwards appeared that James had died in his father's lifetime unmarried and without issue. Thomas died leaving his wife surviving him, but without issue. The question was, whether his personal representative was not entitled to James's moiety? The Court of Exchequer in Ireland held that the bequests contained in the will to the two tenants for life in remainder, and the ulterior limitation in the will, had not taken effect, and that Thomas, the son, had become absolutely entitled to the personal fortune of the testator.

From this decree there was an appeal to the House of Lords, and the reasons assigned by the late Chief Baron Joy and Mr. Maxwell Blacker were: 1st, because it was expressly provided by the will that if Thomas should, after three months from the death of the testator, have any further intercourse or communication with Ann Robinson, he should derive no benefit whatever under the will, and the property was to go over as thereinafter directed in case Thomas should die unmarried *and* without lawful issue; and that "and" meant "or;" and even supposing it not to have that meaning, yet the marriage contemplated by the testator was a marriage *with consent* (I). 2d. That even supposing Thomas to have married according to the directions of the testator, yet the dying without *leaving issue* must mean dying without *leaving* issue living at his death, as the property was personalty and the limitation over to a person *in esse* for life. The respondent's reasons were signed by Sir Edward Sugden, Mr. Greene, the late Attorney-general of Ireland, and the late Chief Justice Pennefather, and were, because the restriction was against an illicit connexion, and could not be deemed a condition in restraint of marriage, and the marriage was a valid one, and the trustees the only judges. If a forfeiture did accrue, it did not extend to the principal: and Thomas having married with consent, all the limitations over failed. The case was argued by Mr. Knight and Mr. Miller, for the appellants, and by the Solicitor-general and Mr. Lynch for the respondents. For the appeal it was insisted that, putting aside fraud, it was not a reasonable construction that a marriage could be solemnized with Ann Robinson. The power of the executors must be confined to circumstances of detail, and they had no power to repeal the will and introduce a prostitute into the family. The general words were controlled by the specific intention.

(I) This was assuming that the marriage with Ann Robinson by a false name was, in truth, a marriage without consent.

Thomas must be married to a third person as a condition precedent; Lucas *v.* Evans, 3 Atk. 260. The gift over on forfeiture could not be confined to the life interests. The meaning of the words "unmarried *and* without issue" was settled by the cases, Maberly *v.* Strode, 3 Ves. 450; Bell *v.* Phyn, 7 Ves. 473; Fairfield *v.* Morgan, 2 New Rep. 38 (*x*) (I). Unmarried *or* without issue, an unusual construction: as settled as any rule could be. [This argument assumed the marriage to be without consent.] As to James's share, standing by itself, they were at all events entitled to that, for there was no power to give the capital of James to his brother, but to him for life and then to his issue. On behalf of the respondents the case was argued on the grounds stated in the reasons. Doe *v.* Rawding, 2 Barn. & Ald. 441, and Doe *v.* Cooke, 7 East, 269, were cited; and as to James's share, that was not to go over to the appellants unless both he and Thomas died unmarried and without issue, which event had not happened. It was in the conjunctive; if read in the disjunctive, the gift over was too remote. The moiety of either, marrying without consent, or dying without having married with consent, would go over to the *other* and his lawful issue, although he had married without consent. Under that gift and as next of kin, one marrying without consent might take the whole. The fund was not given over except in the event expressed. Each son might have lawful issue, and yet not marry with consent. If the word *and* was to be read *or*, although the sons married with consent they would not take absolutely unless they left issue, which was contrary to the clear intention. The judgment of the House of Lords (*y*) reversed the decree, and declared that the ulterior limitation to the charitable uses had taken effect, and that Thomas, the testator's son, did not become absolutely entitled to the personal fortune, and the cause was remitted back to the Exche-

(*x*) Vide *supra*, p. 358. (*y*) 4 December 1830.

(I) My note here is "Lord Chancellor, *so* die unmarried."

quer, without prejudice to such claim as the executors might be advised to make to an allowance in their accounts of any moneys paid over by them to Thomas in respect of the said property.

2. The will appears, at first sight, to be more complicated than it really is. The testator gave to his son Thomas the interest of half his fortune, whilst he kept his engagement as to Ann Robinson. If he broke it, the property was to go as directed, in case of his dying unmarried, and without leaving lawful issue. To his son James he gave the interest of the other half. Each son, on his marriage, with consent, was to have paid to him one-half of the capital (and, of course, in that event, there was no further disposition). If either son married without such consent, or died without having married with consent (which latter event happened as to James) his half was to go to the other or survivor for life, remainder to his lawful issue: and in case both so died unmarried, and without leaving lawful issue, then over. The House of Lords, by deciding that the ulterior limitation had taken effect, and that Thomas did not become absolutely entitled to the personal fortune, appear to have decided two points: 1. That the marriage of Thomas with Ann Robinson was not a marriage authorized by the will, or that there was a forfeiture under the clause restricting intercourse with her; but still leaving the executors, if they could, to maintain their claim to an allowance of the money paid to Thomas, upon the ground, no doubt, that they were deceived, and believed that they were acting in the due execution of the will. In this view Thomas's share would go over, as directed, if the event happened. 2. That James's share, if it went over to Thomas, notwithstanding his marriage, still, with his own share, went over under the ultimate gift, because the event had happened, viz. both of the sons had so died unmarried, and without issue; for James had never been married, and Thomas had married with consent nominally, but not within the meaning

of the testator. The case was not without difficulty, but the view taken by the House of Lords appears to be the correct one.

3. Since the above observations were written I have been kindly furnished with a copy of the speeches made by Lord Brougham, C., in advising the House to reverse the decree, of which I propose to state the substance. Immediately after the argument he said that he entertained no doubt as to the construction contended for on the part of the appellant's counsel of the claim with respect to the dying unmarried *and* without leaving lawful issue, and he entered into an examination of the cases, which he again examined when he finally spoke on the case. But there were two points on which, entertaining some doubt, he should wish to have an opportunity of a little further consideration. The first was, whether or not this really might be said to amount to a consent of trustees. The matter of law on which he desired to have further time for consideration was, whether a marriage of *and* intercourse with a certain individual was validly prohibited by the general words: they were very large; they regard a prohibition of all knowledge of or association with that individual. That such prohibitions were to be taken strictly he agreed, but that they were to be taken so strictly as to exclude the plainest intendment which common sense could make or could affix to the meaning of the words of the instrument, was a proposition which he was not prepared to assent to. If marriage must be taken to be prohibited, it must be clear that the testator intended to prohibit marriage; and further, though it might be possible that had he had his attention directed specifically to what now appeared to be an omission, he might have added a prohibition of marriage, still if he had not done that, it was *casus omissus*, as it were, in his will, and their Lordships might take it as though the marriage with Ann Robinson was not [expressly] prohibited. In conclusion, he seemed to intimate that he should pro-

bably move an affirmance of the judgment. Upon moving on a subsequent day that the decree should be reversed, the Lord Chancellor observed that it was a case of very great importance, upon which at a former time he entertained very considerable doubt. He threw out of view entirely a point upon the material devise in question: "and in case both of my said sons should so die unmarried and without lawful issue," then, &c. It was said that the word *and* should be read *or*, and that was contended on the authority of Maberly *v.* Strode and Bell *v.* Phyn; but they did not bear out the proposition of reading *and* in the disjunctive as *or*, where it would tend to frustrate and not to further the general intent, which would be the effect here. In Maberly *v.* Strode it was found that there was a third clause in the devise, which showed that the testator contemplated the having issue, and the decease of that issue under age. It was manifest that Bell *v.* Phyn rested upon that case. Then the third case, of Fairfield *v.* Morgan, was one in which it was held, by the opinion of all the learned Judges, that instead of *and* being read *or*, *or* may be read *and*, for the purpose of coupling the two conditions together and joining them, for the purpose of carrying into effect the clear intention of the testator. He was clearly of opinion that in this case their Lordships must read *and* in conjunction, so that both these events must occur in order to let in the remainder over. The Lord Chancellor then adverted to the question upon the prohibition as to Ann Robinson. Says the respondent, the testator might have conscientious scruples, and to that argument he paid a great deal of respect, for it was in consistency with the doctrine as to a condition or a devise over in restraint of marriage; it was very possible that the testator might have said, my scruples are conscientious; you ought not to live in concubinage, either with Ann Robinson or anybody else, but I do not debar you from marrying Ann Robinson. If that was not within the condition, there was an end of the

question. It was contended by the respondents that he did marry Ann Robinson, and that this was said to be a forfeiture only in case of his marriage (I) with Ann Robinson. That, however, was not the ground on which he (the Chancellor) intended to proceed in advising their Lordships; but now came the material words, "and in case both of my said sons shall so die unmarried, and without leaving lawful issue," then over. The burden is upon the remainder-man to prove the forfeiture. The only question was, whether that had happened upon which the remainder attached and was let in. He then again referred to the several gifts over, followed by the clause constituting his trustees sole judges of the forfeiture, and to the clause that the marriage should be with consent, and to the gift over in case both of the sons should so die unmarried and without issue. He had called the attention of the counsel to the word *so*, which appeared to have escaped his attention. It was in his (the Lord Chancellor's) mind a most material word; the pressure of it was very much felt by the counsel against whom it operated, and they had urged no ground, in his judgment, upon which he could advise their Lordships to reject that word. The word *so* was material, because it clearly connected that part of the devise with the previous part, marrying with the consent of the trustees or the majority: it was no sense without that. A man cannot die in more ways than one. In case he dies without leaving lawful issue, he should have been inclined to construe in case he should marry and die without leaving lawful issue, or in case he shall die unmarried and leaving no lawful issue. If the word *so* was not there, he should still have said that in soundness of construction, taking this in connexion with that which precedes it, and coupling that with what follows as to the discretion of the trustees, that must mean married in that way alone in which the whole instrument contemplated

(I) This seems to be an error in the note; it probably should be, "in case of his living unmarried with Ann Robinson."

the possibility of their marrying, at least to the extent of taking any benefit by the will. But taking the words in connexion with the word *so*, it must be marriage with the consent prescribed by that word. There was no doubt that connected it plainly, and left nothing to interpretation and inference. The construction of these words being plain, the only question that remained was as to the fact, did he marry with that lawful consent. He then examined the evidence, and doubting whether the marriage itself was valid, considered that the son married under circumstances of fraud and misrepresentation, and every species of deception which could be practised upon the trustees and others; he was therefore clearly of opinion that it was an insult upon the Court to pretend to hold that this was a marriage with the consent of the trustees: they did not know with whom they were consenting to his intermarrying, and therefore the question of consent did not apply. He guarded himself against being supposed to hold that if the trustees had consented they could have retracted their consent. For these reasons he moved their Lordships to reverse the decree. Upon the suggestion of another Peer present, the Lord Chancellor referred to the clause giving the trustees the power to decide what should be a forfeiture. He thought they had a very large discretion reposed in them, but then the question was, had they sanctioned that which was done, so as to relieve from the forfeiture? They had acted under the fraud practised upon them, they not knowing that he was about to marry Ann Robinson. It was the opinion of the lawyers, that notwithstanding the generality of the first part of the will, they might have permitted a marriage with this individual, though he ought to say that the very highest judicial authority with whom he had conferred, doubted whether the marriage was not struck at by the generality of these words, the words associating, and so on; but supposing it to be so that the Irish lawyers well advised these parties that they had that power, they did

not allow him to marry Ann Robinson, and they had not given him the property. If that had been the case, that would have raised a much more difficult question; but if with their eyes open they had decided to permit this, knowing the sort of marriage, he should have been quite clear that would have been sufficient; but they had not done that, and consequently they were the mere victims of misrepresentation.

4. Where a testator gave legacies to his daughters, to be vested in his trustees and executors for their use, until their respective marriages: when they should be married (but with the special consent of his wife during her life, and of one or more of his executors first obtained) the husband was to receive the legacy. If any daughter married without having first obtained such consent, the capital was to go to the children of the marriage, and the husband and wife were to receive the interest only. The wife and all the trustees died, and it was held that no consent to a marriage was necessary; for although the consent of the survivors or survivor would have been requisite, as the trust was intended to last in the survivor, yet, all being dead, the consent of the representatives of the survivor was not required. Lord Eldon, C., said that the general course of the decisions went to confine this power of giving or withholding consent to those who were personally named, and not to extend it to representatives (*z*).

5. Upon gifts by way of substitution, we have only to refer to the case of Pearson *v.* Stephen (*a*), where the testator directed an annuity to be paid to his widow, during her widowhood, out of certain funds, and after her decease or marriage the trustees were to stand possessed of

(*z*) Grant *v.* Dyer, 2 Dow, 73.

(*a*) 2 Dow. & Cla. 328. In p. 337, the appellants' counsel are made to argue that the children took an absolute [life] interest, p. 337; the word life should be omitted, 5 Bligh, N. S. 203. Gray *v.* Garman, 2 Hare, 268; Wordsworth *v.* Wordsworth, 1 H. of L. Cas. 129.

the funds, in trust for his five sons and their respective issue (if any), to be divided amongst them in equal shares, such issue to take *per stirpes*, and not *per capita*. 2. He directed other funds to be held in trust for his daughter Sarah during her coverture, and after the death of her husband the capital to be transferred to her, but if her husband should survive her, then in trust for his five sons and their respective issue (if any), to be divided amongst them in equal shares, such issue to take *per stirpes* and not *per capita*. 3. In other funds he gave a life interest to his daughter Frances, with a gift over, after her decease, to the five sons and their issue in precisely the same terms as before. 4. In case of any deficiency it was to fall upon the portions of his children, Sarah and the five sons, in equal shares. 5. After various bequests he gave the residue to trustees in trust for his five sons and their respective issue (if any), such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares, the shares of such of *them* as should have attained 21, to be paid to them respectively *forthwith after his death*, and the shares of such of them as should be under 21, to be paid to them as they should respectively attain 21. 6. He appointed guardians to such of his children as should be under 21; the children were to be maintained out of the annual income, and any surplus was to be accumulated for their benefit. The eldest of the five sons had several children living at the date of the will, and the death of the testator; the other four sons were unmarried; Frances died in her father's lifetime, and the widow died before the decree. Sir John Leach, the Master of the Rolls, decreed the five sons to be tenants for life of the funds given to them and their issue as stated in Nos. 1, 2, & 3 (I); and after their deaths their children respectively to be entitled to the capital, and decreed the

(I) There was a slip in the decree in giving a fund which was directed to fall into the personal estate, to the sons for life, and then to their children, without reference to the age of 21 years.

five sons in like manner to be tenants for life of the residue (No. 5), and that upon the death of each, his one-fifth would be to be divided amongst all his children equally, the shares of such of the children as should *at the death of their father* have attained the age of 21, to be paid to them immediately upon the decease of their father, and the shares of such as should not have attained that age, to be paid to them when they should attain 21.

6. From this decree there was an appeal to the House of Lords, and the decree was reversed upon the motion of Lord Brougham, C., and it was declared that the five sons were entitled absolutely in equal shares to the funds given to the widow for life (No. 1), and to his daughter Frances for life (No. 3), and to the residue (No. 5), and as to No. 2, it was declared that if Sarah should die in her husband's lifetime, such of the five sons as should be living at her death would be entitled to the fund equally, provided that if any of them should die before Sarah, leaving issue, such issue, if living at her death, would be entitled to the share their parent would have been entitled to in case he had been alive at Sarah's death, and to stand in the place of their parents, and to take equally.

7. The decision in the Lords appears to be the true view of the case as to the gifts Nos. 1 and 3, and No. 5, the gift of the residue. The several gifts were explained by the residuary gift. The testator directed any deficiency to fall *on the portions of his six children* whom he named. If the words relating to the attainment of the age of 21 years referred to the children only, it was clear that the testator meant substitution. If they applied to children and grandchildren, still they directed immediate payment, and therefore the decree at the Rolls could not be maintained. The testator had not a continuing trust in view. If the children had taken for life only, then if they had had no issue, the capital would have been undisposed of contrary to the clear intention of the testator. But it would be

difficult to support the decree in the Lords on the contingent gift (No. 2), in the event of Sarah dying in her husband's lifetime. The gift in the will was in that event generally to the five sons and their issue, but by the decree the happening of the contingency instead of the death of the testator was taken as the period for the original or substitutionary gift to take effect: To such of the five sons as *should be living at Sarah's death*, provided that if any of them died before the decease of Sarah leaving issue, such issue, *if living at the death of Sarah*, were to take their parent's share. This was the decree, which therefore gave a benefit by survivorship amongst the sons. If four died in Sarah's lifetime without issue, and one survived, he would take the whole. That was not the testator's intention, nor did his words warrant it. If all died in their sister's lifetime, and none left issue surviving her, the property was undisposed of (except as part of the residue), notwithstanding he express gift. If the proper period for the substitution had been decreed to be at Sarah's death, yet the five sons should have been held to take immediate transmissible interests, subject to be defeated in case of the death of any in Sarah's lifetime leaving issue who should survive her in favour of such issue.

SECTION V.

OF VOID DEVISES.

1. *As too remote.*
2. *For uncertainty.*
3. *Jones* v. *Hancock, proviso giving portion of estate over on marriage with a person of inadequate fortune held void for*
4. *uncertainty as to the interest.*
5. *Shuldham* v. *Smith, words of contingency referred to testator's death contrary to expression in favour of intention.*
6. *Reversed, and devise held void for uncertainty.*
7. *Legacy given, as an addition to one stated to be given by a codicil, for the same purpose as before named, both legacies void for uncertainty, as purpose did not appear.*
8. *Gift in mortmain: power to purchase lands in Scotland not implied, although testator a domiciled Scotchman, and trusts were for objects in Scotland.*

1. We have already seen in what cases devises are void as too remote (*a*).

2. W have also seen in various instances how rarely a will is held void for uncertainty: it being the duty of the Judges to explain a will if possible, and not to deem it a nullity because it is ambiguous (*b*).

3. But where a portion or share of the testator's estate is given, it must appear on the face of the will what interest or share in his property the testator intends to dispose of. Thus in Jones *v.* Hancock and Long *v.* Hancock (*c*), the testator devised his estates to his eldest daughter Ann during her life, remainder to her sons in tail male successively, remainder in like manner to his second daughter Frances and her sons, remainder to the daughters of Ann, remainder to the daughters of Frances. But he devised his

(*a*) *Supra*, p. 313. (*b*) *Supra*, p. 263.
(*c*) 4 Dow, 145. 471.

estates to Ann, "on this express condition, that she marries a man really and *bonâ fide* possessed of a property at least equal if not greater than the one I leave her, and if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries, and all the residue of my property shall immediately pass over and be given up to my second daughter Frances, to whom in that case I bequeath it." After other directions, he devised, in case his two daughters died without issue, that his estates should go to his brother Hugh. The testator died without lawful issue, and Frances died in his lifetime, a few years old. Joseph his eldest brother was his heir. Ann married William Hancock, who was possessed of personal property only of a value about half the value of Ann's life interest, and about one-sixth the value of the fee simple; after this marriage, the testator's heir at law brought an ejectment, to recover the surplus or excess of the property above the fortune of Hancock at the time of the marriage, and upon argument the Court of King's Bench held that the heir was entitled to five-sixths of the estate; that judgment was reversed in the Exchequer Chamber. Hugh's heir also brought an ejectment, claiming under the ultimate devise in the will; the Court of King's Bench decided against his claim, and that judgment was affirmed in the Exchequer Chamber. The Court of King's Bench must have considered the devise over operative, and have held that Frances having died without issue, the estate descended to the heir at law and did not pass under the ultimate devise. The Court of Exchequer Chamber agreed with the King's Bench as to the claim of the remainder-man, because the event of the daughters dying without issue had not happened, and they disagreed with the King's Bench, as to the claim of the heir at law, because if the limitations to Ann's sons and daughters failed, the next estate must take

effect, and the next estate was an *implied* estate tail in Ann (*d*).

4. There having been a special verdict, the case was carried by writ of error to the House of Lords, and the opinion of all the Judges upon a new point raised during the argument, viz., whether the devise over was void for uncertainty was that the devise over was void on that ground, and that Ann was still tenant for life of the whole of the estate. Gibbs, C. J., said they thought the devise over was void for uncertainty, and that the proviso could not have effect, though the event in which it was to operate had taken place. The uncertainty was this: The will gave over an uncertain part, not specifying the lands if to be held in severalty, or if this should be considered as an undivided portion in the whole, it could not be discovered from the will what that portion was. The only way in which the person could take the excess was that he should have some undivided portion of the whole; but they thought that the devise did not define any specific interest which the objects of it could take. The question of value was one which could not be left to a jury, but the principle of law was that such a devise was not sufficient to create a tenancy in common, for the will did not sufficiently point out what each was to take, and the specific interest or share of each did not appear from the will, which aimed at creating the tenancy in common. The principle of their decision was, that the interest or share must appear on the instrument itself. Lord Eldon, C., and Lord Redesdale concurred in this view, and the judgment of the Court of Exchequer Chamber in both cases was affirmed.

5. A devise may, of course, become inoperative if the

(*d*) See 4 Dow, 208: they must not only have *implied* an estate tail, but have held that the gift over on the marriage to Frances, was in effect a gift over to all the other uses of the will, including the implied estate tail in Ann. There was in the will a like provision as to Frances, if she should be in possession of the estates and marry.

event do not happen, upon the happening of which the testator intended his gift to depend. Thus, in Shuldham *v.* Smith (*e*), where the testator gave his real estates unto his nephew, Lemuel, his heirs and assigns for ever, in trust, to divide the clear rents into certain parts, and pay a certain number of them to several persons therein named for life, including himself, with benefit of survivorship as to all the parts to Lemuel for life, and with benefit of survivorship after his death amongst the other surviving annuitants, and after the death of the survivor of the nine annuitants (naming them), then he devised his real estate unto all and every the children of his late sister Elizabeth, by her three several husbands, that shall be then living, and their heirs and assigns for ever, equally to be divided between them as tenants in common; and if there should be but one such child, *and no issue of any of the other children then living*, in that case he devised all his real estate unto such surviving child, his or her heirs and assigns for ever. At the death of the testator there were six children living of the testator's sister Elizabeth, of whom two, Sarah and Elizabeth, were children of her third marriage, and Sarah afterwards died without issue, leaving her sister Elizabeth her heiress at law. The surviving annuitant died in 1809, and the last named Elizabeth, the daughter of the sister, was her only child then living, but there were issue of several of the other children of Elizabeth then living. The contest was between a descendant of Elizabeth, the testator's sister, who was his heir at law, and Elizabeth, the surviving child of Elizabeth, the testator's sister. The Court of Exchquer, and the Court of Exchequer Chamber in Ireland, held that the six children living at the testator's death took vested interests, and Elizabeth, the surviving child, therefore, took two-sixths, one-sixth as her original share, and one-sixth as the share of her deceased sister of the whole blood. It is said that the words, "that shall be

(*e*) 6 Dow, 22.

then living" were considered as referable to the time of the death of the testator (*f*). But the ground probably was, that upon the whole will taken together, the intention was manifest not to die intestate as to this property, and that the testator intended the children who survived the last annuitant, and the issue of those who died in the meantime, to take the property; but as this could not be altogether effected by any construction of the will, the courts were bound to execute the intention as nearly as might be without doing violence to the words. This they did by construing the words of contingency as meaning only subject to the life interests, during the continuance of which the children of Elizabeth were not to take any interest in possession. This construction no doubt vested a share in each child living at the testator's death absolutely; but as to such of them as left issue, it would enable them to provide for their issue. The case was one of great difficulty.

6. Neither party was satisfied with this decision, and both parties carried the case, by writ of error, to the House of Lords. Elizabeth, the sister's surviving child, claimed the whole, and so did the testator's heir at law. For Elizabeth it was insisted in argument that she took one-fourth or the whole. There were three branches (of Elizabeth the testator's sister) of issue living at the death of the last surviving annuitant; and it was argued that they and Elizabeth, the surviving child, took the whole estate in equal fourth shares; but the main argument was that she took the whole. The first gift to all and every would of course, if it stood alone, give the whole to an only surviving child. It was not disputed that if there had been two children living at the death of the last annuitant, they would have taken. If two, why not one? The second clause did not defeat the first, but declared an intention to which effect, for want of sufficient words, could not be given. The ground upon which the courts below were understood to have decided the case,

(*f*) 6 Dow, 33.

that is, that the words "then living" referred to the death of the testator, was expressly repudiated by Elizabeth's counsel. If necessary, it was insisted that after the words "then living," the words, "or if dead, leaving issue at the death of the surviving annuitant" ought to be supplied. For the heir at law it was insisted that the testator had not provided for the event which had happened. He had declared by the second clause that the first did not provide for the case of an only surviving child, and he provides for that event only in the event of there being no issue of the others. The words of survivorship clearly referred to the death of the last annuitant. The Judges were unanimously of opinion that Elizabeth took no estate or interest in the devised estates. Looking at the whole of the will, and observing how the several interests were disposed of, although they plainly perceived that the testator did not intend that the heir at law should take anything while there existed any issue of his sister Elizabeth living at the death of the surviving annuitant, yet it was impossible for them to discover with any certainty to whom, or in what proportions, the interests were given. And as they could not make a disposition for the testator where he had made none for himself that they could with any certainty discover, the whole, as undisposed of, must go to the heir at law. Lord Eldon, C., and Lord Redesdale agreed with the Judges, and accordingly the judgment was reversed. It was hardly to be expected that the original decision could be supported after it was renounced by Elizabeth herself. It was a bold construction in favour of the intention, as far as effect could be given to it by any construction.

7. Where (*g*) a testator made a codicil to his will, and stated that in a codicil to his will he gave to the corporation of Gloucester 140,000*l.*, and in this he wished his executors would give 60,000*l.* more to them *for the same purpose as he*

(*g*) Corporation of Gloucester *v.* Osborn, 3 Hare 131; 1 H. of L. Cas. 272.

had before named, and then bequeathed legacies to different individuals, and gave the rest of his property to his executors for their own interest, and no codicil could be found touching the 140,000*l.* legacy, it was held by Wigram, V. C., and his decision was affirmed in the House of Lords, that both of the legacies were void for uncertainty, as the purpose referred to in the codicil which attached to both was not known; and although the gift was to a municipal corporation, and it might therefore be considered to be for its own purposes, and might be supported as a charity, although not fully ascertained, yet as a municipal corporation may take property in trust for individuals, it was impossible to say with legal certainty that such was not the case in this instance.

8. Of course a gift in mortmain, as it is termed, is void, and in the Attorney General *v.* Mill, the disposition was held void, although it was argued that a clear intention was shown to have the money laid out in lands in Scotland (*h*). The testator was a Scotchman, and after a long residence in the West Indies resumed his domicile in Montrose; he went to London on business, and being seized with illness, made his will, by which he gave all the residue of his real and personal estate to four trustees; one, James Mill, resident near London; two, George Mill and Hercules Mill, in Montrose, and one, Patrick Bartlett, in the West Indies, upon trust to invest such part as should not consist of real estate, in the purchase of lands or rents of inheritance, in fee simple, for the purpose mentioned in an instrument of even date. By this instrument he declared the trust to be to pay the yearly rents to his two nearest of kin, and residing within 20 miles of the town of Montrose, the said James Mill and his heir, when residing within the said distance; Sir Alexander Ramsay and Sir David Carnigie and their heirs, when he or they should reside within the said distance; and to the magistrates of Montrose for the time being; it being his

(*h*) 5 Bligh, N. S. 593, where the reasons are inserted as the argument; 2 Dow. & Cla. 393. The case was fully argued.

desire that neither of his trustees, or their heirs, assigns, or successors, should act in the execution of the trusts, but such as should reside and live within 20 miles of the town of Montrose; and they were to distribute the rents to charitable purposes in favour of residents in Montrose, or within a certain number of miles of it. And he provided for a succession of trustees resident within 20 miles of the town. He had no real estate in England or Scotland. Lord Lyndhurst, C., decided that the bequest was void, as there was no power in the trustees to lay out the money in the purchase of lands in Scotland. From this decision there was an appeal to the House of Lords, and the writer felt confident that the decree could not be supported. It was considered clear that from the circumstances appearing on the face of the will, a power ought to be implied to lay out the money in land in Scotland; and if so the will was valid. It was a forced construction to confine the will of this Scotchman, creating trusts to be executed by resident trustees in Scotland for objects there, to the purchase of lands in England. Would, it was asked, a purchase of lands in Scotland have been a breach of trust? The case stood a long time for judgment, and at length Lord Lyndhurst, C., stated that he could not see that the testator contemplated the purchase of real property in Scotland, and then it came to be a purchase of real property generally, to be vested in trustees for charitable purposes, in which case the bequest was void by the statute of mortmain. The testator spoke of lands in *fee simple*, which was an English expression (I), and he was of opinion that the purchase of lands in Scotland was not in his contemplation; and thereupon the decree was affirmed.

(I) The will was drawn in England, but it also spoke of *rents of inheritance*, and there was a deed as well as a will. No weight appears to have been given to these circumstances from which it was argued the testator's intention was to be collected.

SECTION VI.

OF CHARGES.

1. *Gore* v. *Lord Lorton, charge where a son should become entitled, extended to a grandson.*
2. } *Spong* v. *Spong, where specific*
3. } *legacies are charged with pecuniary ones.*
4. *The case upon appeal, decree reversed.*
5. }
6. } *Observations upon the decision*
7. } *in Spong* v. *Spong.*
8. }
9. *Creed* v. *Creed, annuities ranking with legacies.*
10. *Decree reversed but restored in D. P.*
12. *Grounds of decision in D. P.*
13. }
14. } *Case examined.*
15. *Boughton* v. *Boughton: legacies charged on real and personal estate, the latter the primary fund.*
16. *Observations thereon.*
18. *Lord Miltown* v. *Trench, payment of legacies postponed till death of tenant for life: interest to be paid in the meantime out of rents.*
19. *Decree affirmed in D. P.*
20. *Observations on the case.*

1. In Gore *v.* Lord Lorton (*a*), the testator after several devises of his real estate, gave it to his daughter Mary for life, remainder to the use of her husband, Francis, for life, remainder to Francis, their son for life, remainder to the use of his first and other sons in tail male, with remainders over, which included the testator's daughter Anne, and Henry her husband, and their sons. And his will was, that in case and as soon as his daughter Mary, or Francis her husband, or the *sons or son* of the said Francis and Mary, or either of them, should by virtue of the limitations aforesaid become entitled to his estate, the same should then become charged with 2,000 *l.* for the younger children of the said Henry and Anne in manner therein mentioned. In the events which happened, the first tenant for life having

(*a*) 2 Bligh, N. S. 286; 1 Dow, N. S. 190. I was of counsel for the appellant.

lived to a great age, the first of the family of Francis and Mary who became entitled to the estate in possession was a *grandson*, and it was insisted that the 2,000 *l.* was not payable, as the event had not happened, for neither Mary nor Francis, or any son of theirs, had become entitled to the estate, but it was held by the Lord Chancellor in Ireland, and his decree was affirmed in the House of Lords, that the 2,000 *l.* was well charged in the event which had happened: the testator was considered as referring to the whole line of limitations in favour of Mary and Francis, and their family.

2. The rule as between specific devisees or specific legatees and pecuniary legatees is, where no contrary intention is expressed, that the pecuniary legatee cannot resort to property that is specifically disposed of. But of course if the testator expresses his intention to prefer the pecuniary legatee to the specific devisee or specific legatee, or if that intention must be necessarily implied from the context, the Court must give effect to it (*b*).

3. In Spong *v.* Spong (*c*), the testator gave his dwelling house and furniture to his wife for her widowhood, and after her decease or second marriage to his son Thomas, his heirs, executors, administrators, and assigns. He gave to his wife for life a rent-charge of 400 *l.*, 300 *l.* per annum of it to be charged on the lands afterwards given to his son Thomas, and the remaining 100 *l.* on the lands afterwards given to his son William, and the provisions for his wife were to be in satisfaction of dower, and he directed a bond executed by his son John to be cancelled, and released him from other debts. And (amongst other legacies) he gave 4,000 *l.* to his executor, Thomas, upon trust for another son and his wife and children. He then devised unto his son Thomas, his heirs and assigns, certain freehold and lease-

(*b*) See 3 Bligh, N. S. 108.

(*c*) 3 Bligh, N. S. 84. The residuary devise is omitted in the statement of the will; 1 Dow, N. S. 365; and see 1 Jo. & Lat. 496, 497, where Joy *v.* Campbell is explained.

hold estates, which he described, subject to the payment of the 300*l.* a year. And he gave to Thomas all his farming stock, goods and chattels, books, debts, &c., and some other things. He gave another freehold estate to his son Daniel and his children, with a contingent gift over to Thomas. And he gave another freehold estate to his son William, his heirs and assigns for ever, subject to the 100*l.* per annum. He gave an annuity for the life of his daughter, payable out of the estates devised to Thomas, and he gave several pecuniary legacies. He directed his legacies to be paid within 12 months after his death. *And he thereby expressly charged and made liable his real and personal estate* to and with the payment of the aforesaid several legacies. And as to all the rest, residue, and remainder of his real and personal estate and effects not thereinbefore given and bequeathed, he devised and bequeathed the same unto his son Thomas, his heirs, executors, administrators and assigns absolutely, and he appointed him his executor. Upon a deficiency of personal assets Alexander, C. B., in an elaborate judgment, held that all the real and personal estates specifically given by the will were chargeable with the pecuniary legacies. He went upon what he considered the plain words of the charge, and the intention of the testator. The charge was general, and the same as if he had charged *all* his real and personal estates: there was no distinct intention indicated by the testator to make his residuary, real, and personal estates more liable than his other real estates. He said that the distinction taken proceeded upon a notion of a difference between a specific and a residuary devise. He found no such distinction warranted. All devises of freehold were specific. It was so expressly laid down by the authorities (*d*).

4. Upon an appeal to the House of Lords this decision was reversed.

(*d*) 1 You. & Jerv. 306.

The case was very well argued for the appellant (*f*), by Fonblanqe and Swann. A specific legacy was given to the widow of furniture, and a debt was to be remitted to one of the sons. It was asked whether these specific legacies were to contribute. The wife was a purchaser by her dower. There were only two cases for the doctrine that the Court can prefer general legatees to specific legatees, Brown *v.* Allen, 1 Vern. 31, Lewin *v.* Lewin, 2 Ves. 417. The Chief Baron miscarried in his rule that there was no distinction between a devise of real estate by specific description, and a general residuary devise, Hamly *v.* Fisher, Ambl. 127, 1 Dick. 104. Lord Cooper and Lord Hardwicke agreed there was a sound distinction between residue and a devise of part, but they admitted there were *dicta* the other way. Thomas, the appellant, was the residuary devisee. How do you account for the testator giving to him estates specifically which would pass by the residue; or for the charge of specific parts with certain sums, if he meant them to be liable to other sums? The express charge of part of the annuity is an exclusion of all other charges by implication. In the will itself the word *all* (my estate, &c.) is not to be found. The Chief Baron found Joy *v.* Campbell was an authority: the direction there to secure the legacies was stronger than in this case. The subject of the specific devise there was not charged. What was charged was so charged because it fell into the residue. Lord Manners, who moved the reversal of the decree, thought there was a marked and obvious distinction between property specifically devised and real estate which passes under a residuary clause: in the one case the devisee takes the specific thing devised—in the other case the residuary devisee takes such part of the real property as shall remain after satisfying the charges affecting the real estate. By the general rule a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy, but there can be no such rule as

(*f*) From my own note.

to a residue. He said that he had communicated his opinion to Lord Eldon and Lord Redesdale, both of whom concurred with him in it (I).

5. In a later case (*g*), in the Court of Chancery, where there was according to the authorities a clear charge of the legacies by implication on the residuary real and personal estate (II), the Vice Chancellor having decided the case upon another ground, viz., that the pecuniary legatees were entitled to have the assets marshalled against a residuary devisee of real estate, Lord Cottenham, C., took occasion to observe upon the latter question, although he decided the case upon the first ground. He said it had been supposed that the point had been set at rest by the decree in Spong *v.* Spong. The case itself did not very closely apply to the present, as there was no question about marshalling: *the only question being between devisees, upon the construction of the will, as to whether part of the estate was not primarily liable, the estate being by the will made subject to the payment of the legacies.* The testator, after devising some particular lands to one person, and giving certain legacies, charged and made liable all his real and personal estate with the payment of his aforesaid legacies, and then gave to his son the residue of his real and personal estate, and appointed him executor. It had been held in the Court of Exchequer that the lands specifically devised, and those which passed under the residuary clause, were equally liable upon the principle that as all

(*g*) Mirehouse *v.* Scaife, 2 Myl. & Cra. 695.

(I) In 1 Dow, N. S. 378, it is stated that Lord Lyndhurst, C., also concurred with him.

(II) A gift of legacies, and then a devise of the residue of his real estates, is a clear charge by implication of the legacies on the real estate. This was what I apprehend Lord Hardwicke intended to lay down in Hamly *v.* Fisher, 1 Dick. 105, and also Lord Cowper, in Long *v.* Short, 1 P. Wms. 404, although the case is there put as of a devise of the rest of the testator's lands, without any previous direction as to the debts. See and consider 2 Myl. & Kee. 700; and as to Long *v.* Short, see 1 Jo. & Lat. 472; Tombs *v.* Roch, 2 Coll. 490; Gervis *v.* Gervis, 14 Sim. 654.

devises of freehold were specific, there was no ground for any distinction. In the House of Lords this was otherwise decided, and so far Lord Eldon and Lord Redesdale, who appear to have been consulted, would seem to have concurred, but it did not follow that they concurred in all the reasons assigned by another Peer in moving the judgment. *The decision certainly proceeded upon a distinction between lands specifically devised and a residuary devise of lands as to which should be primarily liable to a general charge created by the will to which both were subject,* and it was precisely the case put by Lord Hardwicke in Hanby *v.* Roberts (1), except that the case put by Lord Hardwicke was between a residuary devisee and a specific legatee, *whereas Spong v. Spong was between a residuary devisee and a specific devisee.* In neither was there any question of marshalling, *but of priority of liability to the charge.* Lord Manners, indeed, was made to say, "by the general rule a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy, but there can be no such rule applicable to a residue." It does not appear how this observation could apply to the case before the House, *inasmuch as the will charged all the real estate with the legacy,* and it does not appear that it had any reference to a case of marshalling, although it might in its terms embrace that case. At most it was only a *dictum* which, if it was intended to apply to the case of marshalling, was not referable to any matter in judgment at the time.—The decision of the House of Lords in Spong *v.* Spong did not determine that the devise of lands as a residue was not in the sense in which the term must be understood for the purpose under consideration, a specific devise, but that upon the construction of the will, and according to the intention of the testator, in that case such devises were to be subject to the charges in *priority to the other property specifically given.*

(1) This is the same case as Hamly *v.* Fisher.

6. It is important that there should be no misunderstanding as to what really was decided by Spong *v.* Spong. Lord Cottenham appears to suppose that it was decided in that case that *all* the testator's real estates were charged with the pecuniary legacies, but that the residuary real estate was the primary fund, and the lands specifically devised the secondary fund for payment of them. The decision, it is apprehended, actually was, that the residuary real estates only were charged with the pecuniary legacies, and that the real estates separately and specifically given were not at all charged therewith. Consequently there was no question of priority of liability to the charge. There was a deficiency of assets including the estates which passed by the residue to answer the pecuniary legacies (I), and the only question was whether the real estates specifically devised were liable to make good the deficiency. The Court of Exchequer held that they were, but the House of Lords decided that they were not. Lord Manners's observation, which was observed upon by Lord Cottenham, was in truth extracted from Joy *v.* Campbell, and it plainly did apply to the case before the House, inasmuch as the will did *not* charge all the real estate with the legacy, but only the residuary real estate. Spong *v.* Spong was a case between a pecuniary legatee and a specific devisee of land, and not between a residuary devisee and a specific devisee.

7. In Young *v.* Hassard (*h*), the Chancellor of Ireland observed that the case of Spong *v.* Spong, though resembling the one before him in some particulars, was distinguishable from it. In that case, there were first specific devises and

(*h*) 1 Jo. & Lat. 471; and see p. 496.

(I) The executor and devisee, Thomas, stated in his answer, his belief that the whole of the real estates specifically devised to him would not be sufficient, if sold, to satisfy the unpaid legacies, and the several other charges then existing against the testator's estates; and he stated that he was a creditor against the personal estate for upwards of 6,000*l.* paid by him for debts, &c. beyond the sums received by him from the personal estate.

bequests of real and personal estate and gifts of general legacies; there was then a charge of the legacies upon the testator's real and personal estate, which was followed by a residuary devise and bequest of his real and personal estate, and the decision of the House of Lords was, that the charge of legacies should be confined to the residuary property, and that it did not affect the specific devises and bequests. The argument he urged at the bar was that the charge at the end of the will was to be treated in the same way as if it had occurred at the commencement of it, but the House of Lords decided otherwise, and held that the specific devises and bequests were not subject to the payment of the general legacies.

8. In the case of Creed *v.* Creed (*i*), in the House of Lords, Lord Cottenham observed that if the gifts of the annuities in that case were to be considered as gifts of specific interests in the real estate, they could not be affected by a general charge of legacies, for which he cited Spong *v.* Spong. But this, as we have seen, is a question of intention, and the case of Spong *v.* Spong can hardly be brought to bear upon Creed *v.* Creed, where both annuities and legacies were charged upon the same estates. The real question in Creed *v.* Creed was whether the annuities had a priority over the legacies, which depended, as we shall presently see, upon circumstances that did not occur in Spong *v.* Spong.

9. In the case above-mentioned of Creed *v.* Creed (*k*) the question was whether annuities given by the will out of the real estate had priority over legacies directed to be paid out of the personal estate, but also directed, as well as the debts, to be raised out of the real estate in case of a deficiency of the personal estate. The testator, 1. gave to his wife an estate called Ballynatty and certain furniture, &c., freed

(*i*) 11 Cla. & Fin. 507.

(*k*) 1 Dru. & War. 416; 11 Cla. & Fin. 491. See Jackson *v.* Hamilton, 9 Ir. Eq. Rep. 430, as to the case of Long *v.* Short.

from any debt which he might owe (I). And he gave her an annuity or yearly rentcharge of 1,000 *l.* for her life, charged upon and to be issuing out of all his real estates (except Ballynatty), and to be paid by two equal payments in the year, on the days named, the first payment to be made on such of the said days as should first happen after his decease; *and he thereby charged the same therewith,* and also empowered his wife and her assigns to take every remedy for recovery thereof as in cases of rent-service was usual; 2, he directed that all his debts and funeral expenses should be paid as soon as conveniently might be out of his personal property not before disposed of, and that any deficiency should *be raised and paid by his trustees and executors, in such manner as they should think proper, out of his real estate* (except Ballynatty), *and he thereby charged the same therewith;* 3, he then gave an annuity or rentcharge of 100 *l.* to his sister for her life, to be issuing and payable out of his real estates (except as before), *in just the same words as he had used in the devise of the* 1,000 *l. a year to his wife*; 4, he gave to each of two nieces 2,000 *l.*, to his reputed son 5,000 *l.*, and to a friend 2,000 *l.*, and he directed the said legacies to be paid by his trustees and executors, as soon as conveniently might be after his decease, out of such part of his personal estate as aforesaid as should remain after payment of his debts and funeral expenses, and that such part of the said legacies as should remain unpaid by the said personal estate should be *raised and paid by his trustees and executors, in such manner as they should think proper, out of his real estates* (except as aforesaid), *and he thereby charged the same therewith;* 5, he gave two annuities or yearly rentcharges of 80 *l.* and 50 *l.* to two servants, to be issuing and payable out of his real estates (except as aforesaid), *in just the same words as he had used in the devise of the* 1,000 *l. a year to his wife;* 6, he be-

(I) The clauses are not numbered in the will.

queathed all the residue of his real and personal property to his brother William, his heirs, executors, administrators, and assigns for ever, and he appointed him and another person his executors. The widow, by a marriage settlement, had a jointure rentcharge on the lands devised by the will.

10. Upon a bill filed by the widow to have her annuity paid and the accounts taken, Lord Plunket, C., directed a sale of the testator's estates discharged of the several annuities bequeathed by his will (I), and ordered the creditors and the costs of all parties to be paid out of the produce. The lands were sold and the debts and costs paid, and Lord Plunket then declared that the annuity of 1,000 *l.* and the other annuities in the will were entitled to priority over the legacies, and the residue of the fund was to be distributed amongst the annuitants rateably. The funds were insufficient to pay the arrears, and the legacies seem to have been wholly unprovided for except so far as the executor had paid them, which payments were not allowed to him; but the decree was without prejudice to his right to recover them from the legatees. Upon a rehearing before Sir Edward Sugden, C., this decree was reversed so far as it declared that the annuities were entitled to a priority over the legacies. But upon an appeal to the House of Lords Lord Plunket's decree was restored, and Sir Edward Sugden's was reversed.

11. The original decree, which directed a sale of the whole of the estate discharged of the annuities, was hardly con-

(I) Lord Cottenham, in finding fault with the form of the decree on the rehearing, upon the ground that the legatees might have been paid part of their legacies out of the personal estate (which however it was stated had been exhausted in payment of *debts*), added, that the decree was also wrong in directing a sale of the freehold estate discharged of the annuities; that estate should be sold subject to the annuities; 11 Cla. & Fin. 503. This was confounding the decree of Lord Plunket on further directions with the decree on the rehearing: the latter directed no sale, for the whole of the estate had already been sold discharged of the annuities, and the purchase-money, so far as it had not been applied, was in court.

sistent with the decree on further directions that the annuitants had a priority over the legatees. Upon the rehearing, that decree was reversed, on the ground that an annuity is always treated as a legacy, and that it would be difficult to hold, in this case, that the annuity, as coming out of real estate, was specific, and yet that the legacy of 2,000 *l.* and the other legacies in the will were not equally so. Suppose it was said, a sum of 2,000 *l.* was given, charged on real estate, but directed by the will to be paid in ten years, at the rate of 200 *l.* per annum, what difference could fairly be said to exist between that and an annuity of 200 *l.* per annum for ten years, if A. B. should so long live, issuing out of real estate? The truth was, these devises were not specific from the terms of the gifts, but from the nature of the property on which they were charged. Referring to the frame of the will, which was fully considered by the Court, was it a very probable intention, it was asked, that all the annuitants should be picked out from every part of the will, and put into one rank, in priority over all the other parties claiming under the will? The case was decided upon the intention, as collected from the context of the whole will.

12. The error in the decree, on the rehearing, was said in the House of Lords to be founded on the Chancellor's erroneously supposing that the annuities and legacies were charged on the estate in the same manner, whereas the annuities were made legal rentcharges on the real estate, and payable out of that estate alone, whereas the legacies were primarily payable out of the personal estate. The rentcharges, being specific legacies, were not overreached by the power given to the trustees and executors to raise the legacies, that power must be construed in reference to the subject for which it was given, the payment of general legacies. Lord Cottenham (I) adopted this view: It was contemplated, he said,

(I) Lord Lyndhurst, C., does not appear to have given his attention to this case.

that the annuities would continue charges on the real estate, but the direction for the payment of the legacies negatived any intention of applying any part of the personal estate in payment of the annuities. These provisions clearly proved that the personal estate was to be the primary fund for payment of the legacies, and, as it appeared to him, no less clearly that the real estate was to be first applied towards payment of the annuities. If the gifts of the annuities were to be considered as gifts of specific interests in the real estate, they could not be affected by a general charge of legacies: Spong *v.* Spong (*l*). The application of the rule of equity to the case was very simple. Each claimant under the will must first resort to the fund primarily liable to his demand. The annuities and legacies could not be put on the same footing, because these rent-charges were an interest in the land itself, and necessarily specific: Long *v.* Short, and other cases. Did, then, the legatees stand in the same situation, with reference to the lands? Their claims were to legacies charged indeed upon the lands, upon a deficiency of the personalty; but such a charge could not alter the character of the legacies, or make them specific. In Wilcox *v.* Rhodes, 2 Russ. 452, the testator, after giving several legacies, guaranteed the same out of certain lands, and then gave other legacies; and it was held by Sir John Leach, and affirmed by Lord Eldon, that the first class were payable out of the general estate, and were not specific, although the general estate, being insufficient to pay all, they were entitled to have the proceeds of the property upon which their legacies were guaranteed, applied exclusively to the payment of their legacies. General legacies did not become specific because they were payable out of the proceeds of real estate; but the gifts of the proceeds of a real estate may be specific, as in Page *v.* Leapingwell, 18 Ves. 463. So the charge of the legacies upon the real estate did not make them specific, although

(*l*) Vide *supra*.

the annuities issuing out of them were so. Lord Campbell said that, without any communication with Lord Cottenham, he had arrived at the same conclusion; and so the decree on the re-hearing was reversed.

13. This was really a question of intention, to be collected, no doubt, with reference to the rules of law. It was denied by no one that the annuities were legal and specific charges on the land: but the question was, were the legacies, whether strictly specific or not, so charged as to be entitled to rate equally with them. If such was the intention, no rule of law prohibited that construction. In Wilcox *v.* Rhodes, the first class of the legatees, although let in on the general estate, had the whole of the estate on which they were guaranteed exclusively to themselves, so that they had at once the benefit of being in a sense both specific and general legatees. In Page *v.* Leapingwell, the other case referred to, the testator directed his castle and furniture, &c., to be sold for not less than 10,000 *l.*; he then gave sums in gross, part of the monies arising by sale, amounting in the aggregate to 7,800 *l.*, and the *overplus* of the monies he gave over: this was treated as a specific legacy of 10,000 *l.*, and the purchase monies not amounting to that, the particular legatees and the residuary legatee were directed to abate proportionally, treating the gift of the overplus as of 2,200 *l.* These cases appear, as far as they go, to be authorities in favour of the legatees in Creed *v.* Creed. Neither was it denied by any one that the annuitants were at once to resort to the real estate, whereas the legatees were in the first instance to resort to the personal estate. It was not pretended that the annuitants and legatees were put on precisely the same footing by the will, but it was held that when the right of the legatees arose to resort to the real estate, they were then to stand on an equal footing with the annuitants. As far as the legatees were thrown on the personal estate, that was in ease of the real estate, and therefore of the annuitants, but that did not prove that all were not to share

alike when their provisions became payable out of the same fund.

14. Now as to the intention as collected from the will by the court below on the rehearing. The will first gave to the wife (who had a jointure) an estate discharged of debts, so that when the testator intended her to hold discharged of any liability, he knew how to express his intention. He then gave her a legal rent-charge of 1,000 *l.* a year before he provided for either debts or legacies, and without any reference to them. He then directed his debts and funeral expenses to be paid out of his personal estate, and if that proved insufficient his trustees were to raise and pay them in such manner as they should think proper out of his real estates (except the one given to his wife), and he charged the same therewith. No one disputed that this power included a power of sale, and that it overrode the gift of the rent-charge of 1,000 *l.* a year to the wife, and all other annuities, because such was the nature of the authority, and the intention of the testator; he excepted the estate given to the wife from the authority, but he was of course silent as to the rent-charge, as that was part of the estate which he made liable to his debts and funeral expenses. Here we see that the debts and funeral expenses, although primarily to be paid out of the personal estate, yet when they did attach on the real estate had *priority* over the wife's rent-charge, and it is a strong circumstance that that priority was given by the testator even to the funeral expenses. The testator then gave another legal rent-charge just as he had given the 1,000 *l.* a year to his wife, without referring either to his debts, funeral expenses, or legacies; he then gave large legacies, one of them of 5,000 *l.* to his reputed son, Charles Creed, and directed them to be paid out of such part of his personal estate as might remain after payment of his debts and funeral expenses, and such part of his legacies as might remain unpaid by the personal estate, he directed his trustees to raise and pay in exactly the

same words as he had directed the residue of his debts to be raised and paid. Now it was insisted that this power did not override the legal annuities, and it was so decided by the House of Lords. But it was not observed by the House that here, as in the previous authority to the trustees to raise the debts out of the real estate, the estate given to the wife was expressly excepted, but the will was silent as to the annuities. The testator had in each instance carefully excluded the estate given by his will to his wife from the power to sell, to pay the debts, funeral expenses, and the legacies. Was not that evidence that he did not intend to protect the other interest, which he did not name? It was admitted that the very same words gave to the debts and funeral expenses priority over the annuities. How then were the legacies to be deprived of their equality under these words? How could the words of the first authority be read as including the whole estate, and the same words in the second authority be read as including only so much of the estate as should remain after payment of the annuities? This was not a simple charge, but an express direction to raise them out of the real estate in just the same language as the testator used in the previous direction to raise his debts out of the same estate. Suppose the parties had made only one sale for raising both debts and funeral expenses and legacies, must they have sold different interests? The truth is, that the testator took it for granted that his property would answer both his debts, funeral expenses, annuities, and legacies. But he intended the amount of the legacies like the debts and funeral expenses, as far as the personal estate fell short to answer them, to be raised by his trustees out of his real estates, and that placed the legatees at least on an equality with the annuitants. The testator concluded his will by giving legal rent-charges to two servants, and although these gifts followed the direction to raise and pay the legacies out of the real estate, these annuitants in common with the rest

were held to take in priority to the legatees, and in the result to wholly exclude them from the benefit of the real estate. This does not appear to have been the intention of the testator, and the annuitants would, it should seem, have had a full measure of justice by being allowed to stand on an equality with the legatees; nor was a contrary construction required by any rule of law of which I am aware.

15. In Boughton *v.* Boughton (*m*), the question whether a direction to pay annuities and legacies out of real and personal estates rendered both equally liable, or the latter was to be first applied, called for a decision. The testator gave to trustees, their heirs, executors, &c., all his real and all other his personal estate, (having previously bequeathed certain furniture and specific chattels to his sister), upon trust to receive the rents, interest, dividends, and profits thereof, to retain thereout yearly 10*l.* for their trouble, and then to invest certain sums for different purposes, and to pay certain legacies, and also to pay annual sums for maintenance, &c., and life annuities, and to pay some legacies to charities *out of his personal estate*, and then out of the rents and profits of his trust estate and premises to pay annual sums for the maintenance of the sons of his two nephews till 25. And he directed his trustees to invest all the surplus of the rents, issues, and profits of his said trust estate and premises (if any), after payment of the several annuities, legacies, and charges thereinbefore expressed, at interest to accumulate; and the trustees, their heirs, executors, and administrators should stand seised of the trust estate and the accumulations thereof, upon trust, when any son of either of his nephews should attain 25, to make a valuation of his trust estate, and then to be divided into as many equal lots as there should be sons of his two nephews then living, and each

(*m*) Printed Cases, D. P. 1828, not yet regularly reported; 1 Coll. C. C. 26, *nom.* Broughton *v.* James; vide *supra*, p. 349, the question upon remoteness. It is now reported in 1 H. of L. Cases, 406.

son, when 25, was to have one lot for him and his children. But he gave an option to the eldest son attaining 25 of each nephew of choosing certain estates named, as his lot, subject to account for any overplus in value. The gifts to the sons were, as we have seen, held to be void as too remote, and the heir at law claimed to be entitled to the real estate, subject only to the annuities, legacies, and charges, in case only of a deficiency in the personal estate to satisfy them. The Vice Chancellor, Sir J. L. Knight Bruce, held, that the 10*l.* a year was a charge on and equally referable to the realty and personalty, and plainly payable out of the general mass. The testator then went on to direct the trustees in a similar way to pay legacies, directing some to be paid out of his personal estate, and being silent as to others, and then he divided, or attempted to divide, the property in lots amongst his family. It was said that in two instances he directed certain real estates to be allotted. That must be taken subject to any charge which the apportionment might render it necessary to make upon them. He was of opinion that the testator had said, as plainly as if he had said it in the very words, that the whole of his property should form one mass, for the purpose of paying rateably those annuities and legacies, except those which he had directed to be paid out of his personal estate. But, upon an appeal to the House of Lords, this part of the decree was reversed upon the motion of Lord Cottenham, C., who thought that the ordinary rule must prevail, and therefore the real estate was to come in aid only of the personal estate. There was no direction to sell the real estate, which circumstance distinguished it from the cases in which the legacies were held to be a charge on the mass of the property.

16. There has been a great diversity of opinion upon this point. Sir John Leach, it is believed, held that such a charge on both realty and personalty ought to be borne proportionably, without reference to the circumstance that the estate

was directed to be sold; but Sir L. Shadwell, V. C., thought this rule wrong, even if the realty was directed to be converted into personalty, but that was overruled on appeal (*n*). In Boughton *v.* Boughton, it was a matter of indifference to the devisees whether the personal estate was to be the primary fund for payment of the legacies and annuities or not, as the whole estate, both real and personal, was given amongst them, and the election given to two of the devisees could not vary the question. The point arose only in consequence of the gifts failing. Still the intention of the testator seems to have been best interpreted by the Vice Chancellor, and the rule of law does not seem to forbid such an interpretation (*o*).

17. We may close this head with the case of Lord Milltown *v.* Trench (*p*), where a tenant for life was, by implication, charged with interest on legacies, although they were not directed to be raised out of the estate given to her until after her death.

18. The testator gave his real and leasehold estates to trustees for 500 years, upon trust to raise and pay 2,000*l.* a year to his wife (afterwards Lady Milltown), for life, in case there should be issue of his marriage living at her death. And in case there were any younger children living at his death, after his decease and the decease of his wife to raise 20,000*l.* for portions, to be paid (in default of appointment by his wife) at the usual times, to be vested at the usual days, but payment to be postponed until after her decease, unless with her consent; and interest, at the rate of five per cent., to be applied for maintenance and education, until the portions were payable. And in case the testator's personal estate should be insufficient for the payment of his debts and legacies, then after his decease and the

(*n*) Attorney-general *v.* Southgate, 12 Sim. 77.

(*o*) See Young *v.* Hassard, 1 Jo. & Lat. 466, but there the charge was of particular annuities.

(*p*) 4 Cla. & Fin. 276. See Coote *v.* Trench, 9 Cla. & Fin. 77; Coote *v.* Lord Milltown, 1 Jo. & Lat. 501.

decease of his wife, by mortgage, &c. to raise the deficiency. He devised the estates, subject to the term, to his sons and daughters successively in tail, in the usual way; and in default of such issue living at his decease, to the use of his wife for life, with remainders over. He gave legacies, which he declared should in any event be paid; the first of which he directed to be paid within one year after his death, with interest at five per cent. till paid. He gave 2,000 *l.* for charity out of his personal estate, and 2,000 *l.* to his wife in any event, with interest at five per cent. from his decease. In case only he should have no issue by his wife living at his death, he gave other legacies to a large amount, one of which he gave with interest at six per cent. till paid. And he directed that all the legacies by his will bequeathed should, from the time they respectively became payable, bear interest at five per cent., and be raised and paid accordingly. And in case his personal estate should be insufficient to pay his debts and personal and testamentary expenses, and the legacy for charity, and the several other legacies which should become payable under his will, he charged the estates in the 500 years term with the payment of the same; and he directed the trustees to raise the same pursuant to the trusts vested in them for that purpose. And subject to the payment of such debts and legacies, he gave the residue of his personal estate to his wife. The testator had no issue living at his death, and his wife survived him. The legacies payable *in any event* amounted to about 12,000 *l.*, and those payable only on the contingency of his not leaving issue at his death, to about 13,000 *l.*; his debts were trifling, and the personal estate appears to have been more than sufficient to pay the debts, and legacies payable *in any event*. Lord Plunket, C., held that, although the legacies given on the contingency were not raisable until Lady Milltown's death, yet that they were in effect charged with the interest on the estates in the 500

years term, in aid of the personal estate, and therefore she, as tenant for life, was bound to keep down the interest according to the general rule.

19. Upon an appeal to the House of Lords the case created some embarrassment, but the decree was affirmed. Lord Cottenham, C., considered what would have happened if the testator had left several children: the eldest would have been tenant in tail, subject to the jointure of 2,000 *l.* a year, the interest of the portions and the interest of the legacies, which interest would have been payable out of the son's income, and not a sum to accumulate against the enlarged inheritance at the period of his mother's death. In the event of the testator's dying without issue, his wife was to become tenant for life: there would be no interest to pay for portions, but she must be liable to the interest of the legacies to which a tenant in tail would have been subject. Lord Plunket, Lord Brougham, and Lord Wynford concurred, and Lord Lyndhurst's concurrence was communicated to the House.

20. The true ground upon which to rest the decision appears to be that which was taken in the court below, viz., that the legacies were charged on the real estate, and carried interest, and therefore the interest was payable by the tenant for life, although by the will the principal was not to be raised until her death. In a later discussion on this case, in the Court of Chancery in Ireland, the Court observed that the trusts of the term of 500 years were an index to the meaning of the will; and if they had been considered in that light it would have prevented much of the difficulty which had arisen. All the references to the death of his wife which occur in the trusts of the term, were made in relation to her annuity of 2,000 *l.* a year, and not in reference to the estate for life afterwards contingently given to her. The testator thought that as the estate was charged with 2,000 *l.* per annum, it would not be advisable that money

should be raised out of the corpus of the estate, pending the existence of that charge (*q*). This, we may observe, may be carried further; and it may be doubted whether, in the event which happened, the legacies were not raisable during the wife's life. For the testator's legacies consisted of two classes, one raisable in every event, and the other only raisable in case he left no issue. He clearly did not intend the first class, if the personal estate should prove insufficient, to be raised until after his wife's death, for the reason before mentioned. But he took care not to give more legacies absolutely than his personal estate would answer. He had no issue when he made his will, and he died very shortly afterwards, and his debts were under 100*l.*, and the personal estate exceeded in amount all the legacies which would be payable in the event of his having issue. The legacies which were the subject of the contest were those given on the contingency which happened of there being no issue, and therefore the case adverted to in the House could not have arisen, for if there had been issue there would have been no further legacies. The eldest son would have been liable to the 2,000*l.* a year, to interest on the portions if there had been any younger child, and to interest on any legacies payable in every event which the personal estate might not answer. But the widow, who could not be liable to the 2,000*l.* a year, or to interest on portions, became subject to the second class of legacies, which came into existence with her life estate. To *her* it was indifferent when the principal was raised, as she was to keep down the interest; but to the remainder-man and legatees it was important that the legacies should be raised at once, so as to stop further accounts and litigation. In the event which happened, the testator did not intend to postpone the raising of the principal: his object was to protect his son, and no doubt he intended that the son should have unencumbered, for his maintenance as a Peer, the small surplus income

(*q*) 1 Jo. & Lat. 514.

during his mother's life, after payment of the jointure and the interest of the portions, and should not pay either the principal or interest of the legacies until after his mother's death, when her 2,000*l.* a year would fall in. The trust, therefore, as far as it was confined to the widow's death, might have been referred to the event of there being issue; and in the event which happened, the charge and trust at the close of the will might have been construed in favour of the intention as a simple trust to be executed at once. It seems impossible to maintain that the interest of the legacies would have been payable, under the trusts of the term, out of the son's income during the mother's lifetime, if there had been a son, and a deficiency of the personal estate.

SECTION VII.

OF LEGACIES IN GENERAL AND OF A DONATIO MORTIS CAUSA.

1. *Wilkinson* v. *Adam, where natural children can take under gift to children of a married man by a woman not his wife.*
2. *Gift of portion to younger children equal to one-fourth of what should remain to eldest son: one-seventh each.*
3. *Where legacies by different instruments are not cumulative.*
4. *Legacy duty payable where estate directed to be converted out and out.*
5. *Domicile; rules of interpretation of will.*
6. *Presumption of satisfaction of legacies.*
7. *Duffield* v. *Elwes: donatio mortis causa of mortgages in fee by delivery of deeds invalid.*
8. *Established in D. P., reversing decree below.*

1. We have but little left to state under this head. In Wilkinson *v.* Adam (*a*), the testator had a wife living for whom he provided by his will, but she had no issue, and she died in his lifetime: he lived with a woman of the name of Ann Lewis, by whom he had three children born before his

(*a*) 1 Ves. & Bea. 422; Printed Cases, D. P. 1823.

will, and all of whom had before the date of his will acquired the reputation of being his children by her: he provided for her also by his will, and gave her a life estate in remainder in an estate he had before devised to his wife for life, and he devised certain property "to the children which he might have by Ann Lewis and living at his decease, or born within six months after, equally, and if but one such child, to such only child and his or her heirs for ever." There was another devise to them in nearly similar terms. There were several passages in the will upon which the Judges relied, as evidence of his intention to provide for illegitimate children: the manner in which the testator described the children themselves, and Ann Lewis, their mother, as living with him [the children were not described as living with him] whilst his wife was then alive, the mode in which he appointed her guardian of such children, the limiting her annuity and her compensation for the guardianship to the time of her continuing unmarried, together with many other passages in the will. Lord Eldon, C., called in three Judges to his assistance, and they were of opinion that the devise was intended to operate in favour of illegitimate children only, and that the three children who had acquired the reputation of being his children by Ann Lewis could take under the general description of children in the will as a class. Lord Eldon agreed in this view, and accordingly dismissed a bill filed to impeach their title, and his decree was, upon an appeal to the House of Lords, affirmed (*b*). As Sir John Leach, V. C., observed, the words of gift were held to be equivalent in expression to a gift to "all the children which I now have or hereafter may have by Ann Lewis who shall be living at my decease or born in due time after" (*c*).

(*b*) See Swaine *v.* Kennerley, 1 Ves. & Bea. 469; Arnold *v.* Preston, 18 Ves. 288; Gordon *v.* Gordon, 1 Mer. 145, 725; Woodhouselee *v.* Dalrymple, 2 Mer. 419; Beachcroft *v.* Beachcroft, 1 Madd. 430; Bayley *v.* Snelham, 1 Sim. & Stu. 81; Harris *v.* Lloyd, Turn. & Russ. 310; Bagley *v.* Molland, 1 Russ. & Myl. 581; Gill *v.* Shelly, 2 Russ. & Myl. 336.

(*c*) 1 Sim. & Stu. 81.

2. Where a testator having a son and three daughters directed that there should be raised out of his real and personal estate a sum sufficient to pay to each of his children, Mary, Elizabeth, and Julia, and any other child or children his wife might have during his life, as and for their respective portions, a sum equal to one-fourth of what should remain to his son, William, or such son or sons becoming an eldest son as his wife might have during his life, payable to his sons respectively at 21. After the reversal of an erroneous decree that one of the daughters was entitled to one-fourth of the value of all the property, it was decreed by the Lord Chancellor of Ireland that each of the younger children was entitled to a proportion equal in value to one-fourth of what remained of the testator's property to the eldest son, after providing for the several bequests, charges, and incumbrances upon the estate, and that each of the younger children was entitled to a sum equal to one-seventh of the net value of the real estates, computed at the time of the testator's death. Upon an appeal to the House of Lords, it was insisted that the proportion and shares were to be computed according to the amount of the property not as it stood at the time of the testator's death, but as it stood at the time of distribution, but the decree was affirmed (*d*).

3. Upon a question where provisions for the same person were made by two testamentary papers, whether the latter was to be considered as an addition to or a substitute of the former, Lord Eldon, C., said that in all the cases of this description it was a clear rule that the internal evidence of the testator's intent, which might be collected from the body of the instrument itself, was entitled to great weight. This observation was made in Hemming *v.* Gurney (*e*), where by the first paper, which the testator began in the usual form of a will, he gave to his wife 500*l.* per annum for her life, to be

(*d*) Coleclough *v.* Gaven, 3 Dow, 267.

(*e*) 2 Sim. & Stu. 311; 1 Dow, N. S. 35; 1 Bligh, N. S. 479, *nom.* Heming *v.* Clutterbuck. See Russell *v.* Dickson, 2 Dru. & War. 133.

placed in long annuities in the names of certain persons, and at her decease to his father for life, remainder to his cousin, Richard Hemming, son of his uncle, absolutely for his use upon his attaining 25 years of age. The other paper was made about three months later, and also began in the form of a will; he thereby gave to his wife as much money as would purchase 500*l.* per annum in the long annuities, and the income thereof to be received by her during her life, and at her death *to his child or children equally. In default of issue* (*f*), to his father for life, and at his death to go to his nephew, Richard Hemming, absolutely: the principal to be placed in the names of certain persons (being the persons named in the first paper), in trust for the wife or his children and his father during their lives respectively. There were many other provisions in each instrument, but the latter contained no appointment of executors or any gift of the residue, which the first did. There was no issue of the testator, and after the deaths of the testator's widow and his father, Richard Hemming claimed two annuities of 500*l.* each, insisting that the gifts were cumulative. The Vice Chancellor, stopping the argument against the claim, was of opinion that the second instrument was not made as an addition to, but as a substitution for the first, if not wholly, at least in the greater part, and plainly as to the annuities in question. This was evident from comparing the form and expressions of the two instruments, from the general similarity of the two annuities and legacies, and from other particular gifts. Upon the appeal, Lord Eldon, C., did not agree with the Judge below that this was a clear case, but thought it a most doubtful and difficult one, although on the whole he joined with him in the conclusion to which he had come, and thereupon the decree was affirmed.

4. If an estate be directed to be converted out and out into personalty, the legacy duty will attach, although in the result the estate be not sold; but where a mere discretion

(*f*) See 1 Bligh, N. S. 483; and see p. 494, n.

is given to sell to answer given purposes, the duty will not be payable as far as the power is not exercised (*g*).

5. In Yates *v.* Thomson (*h*), where the testator, a Scotchman, was held to have had his domicile in England, Lord Brougham observed, that his written declarations must be taken with respect to English law: he thought it followed from hence that those declarations of intention touching his personal property in Scotland must be construed as we should construe them here by our principles of legal interpretation. Great embarrassment might, no doubt, arise from calling upon a Scotch court to apply the principles of English law to such questions; nevertheless this was a difficulty which must of necessity be grappled with. But as to the reception of evidence, he thought the principles which regulated the admission of evidence were the rules by which the Courts of every country guide themselves in all their inquiries.

6. A court of equity may, under circumstances and after a lapse of time, presume legacies to be satisfied (*i*).

7. In Duffield *v.* Elwes (*k*), it was for the first time decided that there may be a valid *donatio mortis causa* of a mortgage in fee of real estate by a proper delivery of the deeds. Sir John Leach, V. C., in the first instance, decided otherwise, and even held that the delivery of a bond accompanying one of the mortgages was inoperative, as the money was also secured by mortgage. He considered that where delivery would not execute a complete gift *inter vivos*, it could not create a *donatio mortis causa*, because it would not prevent the property from vesting in the executors, and as a court of equity would not, *inter vivos*, compel a party to complete his gift, so it would not compel the

(*g*) Williamson *v.* Advocate-General, 10 Cla. & Fin. 1.

(*h*) 3 Cla. & Fin. 544; 8 Bligh, N. S. 622.

(*i*) Campbell *v.* Sandford, 2 Cla. & Fin. 429.

(*k*) 1 Sim. & Stu. 239; 1 Bligh, N. S. 497; 1 Dow, N. S. 1. See Walsh *v.* Studdart, 4 Dru. & War. 159; Thompson *v.* Heffernan, ib. 285.

executor to complete the gift of his testator. The delivery of a mortgage deed could not pass the property *inter vivos*, first, because the action for the money must still be in the name of the donor, and, secondly, because the mortgagor was not compellable to pay the money without having back the mortgaged estate, which could only pass by the deed of the mortgagee, and no court would compel the donor to complete his gift by executing such a deed. As to the case where a bond accompanied the mortgage, he came to the same conclusion, for the mortgagor had a right to resist the payment of the bond without a reconveyance of the estate, and it could not be maintained that the donor of the bond would be compelled to complete his gift by such reconveyance.

8. It does not appear to have occurred to the learned Judge at the moment, that in the case of a mere bond delivered as a *donatio mortis causa*, the action must be brought in the name of the executor, who, by the effect of the donation being converted into a trustee, is bound to allow his name to be used; and that in such cases the remedy to make good the donation never can be against the donor, but must be against the heir or personal representative. The Vice Chancellor prefaced his decree by a declaration of the opinion of the Court that a mortgage security cannot by law be given by way of *donatio mortis causa;* but upon an appeal to the House of Lords this was reversed, and the gift was established. Lord Eldon, C., concluded an elaborate consideration of the case by declaring his opinion that this was a good *donatio mortis causa*, raising, by operation of law, a trust, which being raised by operation of law, was not within the statute of frauds, but a trust which a court of equity would execute.

SECTION VIII.

OF ELECTION.

1. *Election where estates to be contracted for are devised.*
2. *Plain intention to devise the estate required to election.*
3. *Dillon* v. *Parker.*
4. *The question upon the son's will.*
5. *The son's will.*
6. *Sir Thomas Plumer's decision.*
7. *Lord Eldon's.*
8. *Lord Lyndhurst's in D. P.*
9. *Observations on the case.*
10. *The father's will, &c.*
11. *Where devise of part of estate which is charged with wife's jointure rentcharge, to her, entitles her to her jointure and the estate clear.*
12. *What amounts to a conversion of money into land.*
13. *What amounts to an election to retain it in as money.*

1. In the case of Thellusson *v.* Woodford (*a*), where the testator made provisions for his heir-at-law, and directed any contracts which he might enter into for the purchase of estates to be completed, and the estates to be conveyed to his trustees upon the trusts of his will, it was decided that the heir claiming estates contracted for, but not conveyed at the testator's death, was to be put to his election whether he would take the purchased estates or the gifts in the will. But this is no longer important, except as showing the rule in equity, because by the Act of 1 Vict., c. 26, all interests acquired after a will may, with sufficient words, pass by it, and the will is made to speak as at the death of the testator (*b*).

2. A case of election cannot be raised upon a will, unless it appear by demonstration plain that the testator intended to dispose of the property or interest belonging to the person whom you desire to put to his election. *Primâ facie*, it

(*a*) 13 Ves. 209; 1 Dow, 249, *nom.* Rendlesham *v.* Woodford.
(*b*) See Sugd. Purch. 206.

is not to be supposed that a testator disposes of that which is not his own, and it rests upon those contending for a case of election to show that there is that manifest plain demonstration, and utter improbability that he could have meant otherwise than they allege (*c*). Therefore, where Sir Thomas Parkyns, on his marriage, settled his lands at Ruddington, but without mentioning the manor of which he was also seised, to the use of himself for life, with remainder (subject to a jointure rentcharge out of part, and a term to secure it, and a term in the other part to secure portions to younger children) to the use of the first and other sons of the marriage in tail male, remainder (subject to a term for raising portions for daughters in case of there being no issue male) to the use of his right heirs. Sir Thomas, by his will gave his manors, lands, &c. in (amongst several other places) Ruddington, unto trustees for 99 years, to commence from the testator's death, upon trust to maintain and educate his sons during their minority, not exceeding 200*l.* for each, and the remainder of the rents to be laid out in lands, to be settled to the uses of his will, remainder to his eldest son of the above marriage, Thomas, for life, remainder (after the usual limitation to trustees to preserve contingent remainders) to the first and other sons of his son successively in tail male, remainder to his second son, George, and his sons in tail male, in like manner, remainder to his daughter Ann in tail male, with remainder to his own right heirs for ever. There were several provisions as to waste, boon coals, &c., from which it was insisted that the testator considered that the devise would operate at once in possession upon all his estates devised. The testator made a provision for his son George, which he declared was in addition to any portion given to him by the settlement, which he expressly ratified and confirmed, with everything therein contained. Lord Eldon, C., held that the will raised no case of election, but merely passed the interest which the testator had in Rud-

(*c*) 6 Dow, 170, per Lord Eldon.

years term, in aid of the personal estate, and therefore she, as tenant for life, was bound to keep down the interest according to the general rule.

19. Upon an appeal to the House of Lords the case created some embarrassment, but the decree was affirmed. Lord Cottenham, C., considered what would have happened if the testator had left several children: the eldest would have been tenant in tail, subject to the jointure of 2,000 *l.* a year, the interest of the portions and the interest of the legacies, which interest would have been payable out of the son's income, and not a sum to accumulate against the enlarged inheritance at the period of his mother's death. In the event of the testator's dying without issue, his wife was to become tenant for life: there would be no interest to pay for portions, but she must be liable to the interest of the legacies to which a tenant in tail would have been subject. Lord Plunket, Lord Brougham, and Lord Wynford concurred, and Lord Lyndhurst's concurrence was communicated to the House.

20. The true ground upon which to rest the decision appears to be that which was taken in the court below, viz., that the legacies were charged on the real estate, and carried interest, and therefore the interest was payable by the tenant for life, although by the will the principal was not to be raised until her death. In a later discussion on this case, in the Court of Chancery in Ireland, the Court observed that the trusts of the term of 500 years were an index to the meaning of the will; and if they had been considered in that light it would have prevented much of the difficulty which had arisen. All the references to the death of his wife which occur in the trusts of the term, were made in relation to her annuity of 2,000 *l.* a year, and not in reference to the estate for life afterwards contingently given to her. The testator thought that as the estate was charged with 2,000 *l.* per annum, it would not be advisable that money

should be raised out of the corpus of the estate, pending the existence of that charge (*q*). This, we may observe, may be carried further; and it may be doubted whether, in the event which happened, the legacies were not raisable during the wife's life. For the testator's legacies consisted of two classes, one raisable in every event, and the other only raisable in case he left no issue. He clearly did not intend the first class, if the personal estate should prove insufficient, to be raised until after his wife's death, for the reason before mentioned. But he took care not to give more legacies absolutely than his personal estate would answer. He had no issue when he made his will, and he died very shortly afterwards, and his debts were under 100*l.*, and the personal estate exceeded in amount all the legacies which would be payable in the event of his having issue. The legacies which were the subject of the contest were those given on the contingency which happened of there being no issue, and therefore the case adverted to in the House could not have arisen, for if there had been issue there would have been no further legacies. The eldest son would have been liable to the 2,000*l.* a year, to interest on the portions if there had been any younger child, and to interest on any legacies payable in every event which the personal estate might not answer. But the widow, who could not be liable to the 2,000*l.* a year, or to interest on portions, became subject to the second class of legacies, which came into existence with her life estate. To *her* it was indifferent when the principal was raised, as she was to keep down the interest; but to the remainder-man and legatees it was important that the legacies should be raised at once, so as to stop further accounts and litigation. In the event which happened, the testator did not intend to postpone the raising of the principal: his object was to protect his son, and no doubt he intended that the son should have unencumbered, for his maintenance as a Peer, the small surplus income

(*q*) 1 Jo. & Lat. 514.

1,500 *l.*, treated it as his own in all respects, and let it for 21 years absolute, and Sir Henry's solicitor acted in these transactions for John, and the father himself, by letter, desired a power to be prepared for an agent to act for his son in regard to this house. John became also entitled in fee by purchase to an estate called Arnscott (I).

5. Under these circumstances John made his will, in 1769, and gave all his freehold and leasehold estates whatsoever that he was seised or possessed of or otherwise was or should be entitled to in reversion, remainder, or expectancy, unto his father, Sir Henry, for life, and after his decease he gave his estate in Shorter's Court, and the moiety of his estate at Hatch, and all such other his real estates as were devised to him by the will of his grandfather, unto trustees for the benefit of his sisters, Margaret and Catherine; and in case both of his said sisters should happen to die without issue before the estates should be conveyed to them, then he directed the same should be conveyed to his own right heirs for ever. And he gave the manor and capital messuage called Talton, with the estate thereto belonging, the farms in Tredington, and all other his manors and estates in Worcestershire and Warwickshire, his house in Salisbury Court, the other moiety of his estates at Hatch, and all *other* estates whatsoever and wheresoever which descended or came to him, or which should descend or come to him from his father, to his two sisters, Margaret and Ann, their heirs, executors, administrators, and assigns for ever. After a few legacies he gave all the residue of his personal estate to his father, and appointed him executor if he should be living at his death; but if his father should be then dead, he gave the furniture, &c., at Talton to his two sisters, Margaret and Ann, and the residue of his personal estate to his four sisters; but in case his personal estate at the time of

(I) It is stated by mistake in 1 Swanst. 362, and by the Master of the Rolls in his judgment, p. 379, that this was purchased *after* the date of John's will.

his decease should be insufficient for the payment of his debts and legacies, then he charged the same upon *all* his real estates above mentioned; and in case his father should die before him, he appointed other persons executors. By a codicil, made a month afterwards, he devised the Arnscott estate to his father in fee, and he made special provisions to protect his father from the debts which he owed to the grandfather's estate. John died shortly afterwards without having been married, leaving his father and his four sisters surviving him. Margaret and Ann were his sisters of the half blood.

6. The question was, whether John by his will intended to pass the estates in settlement, so as to raise a case of election against his father, or whether he intended merely to pass such interests in them as he might acquire if he survived his father. When the case was before the Master of the Rolls the agreement of 1766 between John and his father was not proved. Sir Thomas Plumer, without deciding the point, said, as John seemed to have imagined that he had power to dispose of the settled estates, it might therefore be contended that they were included in the first devise. And in a subsequent passage he said, "from the undisputed principle that no one can frustrate an instrument under which he claims, Sir Henry might clearly have been put to his election, but the plaintiff maintains that he has actually elected" (I). But he held that if the will raised a case of election, Sir Henry had not elected under it, and even if he had, that his own will raised another case of election, and that *his* devisees had elected to take under his will, and so the plaintiff had no title.

7. When the case came before Lord Eldon, C., he ob-

(I) "The Master of the Rolls was certainly of opinion that no case of election was raised," per Lord Lyndhurst, 1 Cla. & Fin. 314; but in 7 Bligh, 351, his Lordship is represented (I presume correctly) to have said, "Undoubtedly, the Master of the Rolls, when the case was before him, gave it as his opinion that the will did raise a case of election."

served that the will was to operate as to property which might not be the testator's at the time of his death, which would be his if he survived his father, but which would not be his if his father did not die before him. It was difficult to believe that he meant to comprehend estates that were subject to a contingency, by which if his father survived they were not his, for the words giving to his father for life suppose him to die before his father. It was difficult to see how he could devise the house in Salisbury Court, as it was not a subject of the agreement, and could therefore only come to him after his father's death. It was inaccurate also in point of law, in devising estates which were to descend to him afterwards. If the case depended upon the true construction of the will he thought it would be very difficult to say what the testator meant, whether he meant that all the devises relating to the estates which were the subject of that agreement should operate only in the event of his surviving his father, or whether he meant that, notwithstanding the agreement, those estates should revert back into the possession of his father, not under the effect of the agreement, but under the effect of the will. If the latter was his intention there was no doubt a case of election was raised; if, on the other hand, the estates were not to pass by the will to the father in case of his surviving, there would be nothing that could raise a case of election. He was of opinion that no one could confidently say which was the intention of the son. But agreeing with the Master of the Rolls on the other points, he was content to assume that a case of election was raised, and that the father elected to take under it. It escaped Lord Eldon's observation that although the agreement of 1766 did not comprise the Salisbury-court house, yet John's right to it stood upon higher ground, for that agreement contained a provision to render it void in the event which happened; but John, with the knowledge of his father, had possession of this house, rebuilt it at a great expense, and let it, and acted generally as

absolute owner of it. It could not therefore be well doubted that he meant to dispose of this estate, without reference to any contingency of his father's death, and being part of the settled estates, his disposition of it as absolute owner was a key to his intention in disposing of the other settled estates.

8. When the case came before the House of Lords, Lord Lyndhurst, C. B., said that he had read the will again and again, he had attended to the argument, and he confessed that he found great difficulty in coming to any satisfactory conclusion—any sound conclusion as to what the will of the testator really was. Whether he intended, in the event of his dying in the lifetime of his father, to dispose of that property or not, was extremely questionable, and unless he could see his way to ascertain with some degree of satisfaction to himself what the meaning of the testator was, the very foundation upon which a case of election is to be raised must altogether fail. But Lord Lyndhurst also assumed, for the purpose of argument, that there was a case of election raised. As to the house in Salisbury Court, he did not find any sufficient evidence to satisfy him that the house was disposed of by the father in favour of the son. That the son took some interest in the property, and that he took an interest, coupled with a power sufficiently extensive to authorize him to grant a lease for 21 years, he did not deny, but they had no further evidence to satisfy them what the nature of that interest was.

9. This case is well calculated to create doubts whether, in any instance, a case of election can be raised, where the testator has an interest in the estate devised; but it may be useful to consider the weight of the objections in the case before us. John was seised in fee, or had a full power of disposition over the Hatch estate and Shorter's-court house, and also, as it should seem, over the Salisbury-court house; for he had built it at his own expense, insured it as his own, let it for 21 years absolute as his own—his father

standing by and giving directions, but asserting no title—and no security for the money expended, or repayment, was alleged; and a jury must have been directed to presume a conveyance from the father to the son of all his interest, for it was not comprised in the agreement of 1766: he was also seised in fee of Arnscott, which he had purchased. Of the Talton and other settled fee-simple estates, all in his own possession, he was tenant in tail male, under the settlement, and under the agreement, subject to that estate, he had the equitable fee if he survived his father. To the leaseholds for lives he would become entitled under the settlement, without the agreement, if he survived his father. There was besides a leasehold estate for years, to which he would also be entitled if he survived his father (I). Now, then, let us look at his will. He devises all his freehold and leasehold estates of which he was seised or possessed, or otherwise was or should be entitled to in reversion, &c. to his father for life, and if the will had stopped there it might properly have been held that the will passed only what estates and interests he had; but it does not stop there, for *after his father's death* he gave *by name* the portion of the estates which he had derived from his maternal grandfather [including half of the Hatch estate] to his two sisters of the whole blood, and he gave by name the Talton and Tredington [settled estates] and the Salisbury-court house, and the half of the Hatch estate [which he had purchased from his father] and all other estates which descended or came to him, or which should descend or come to him from his father, to his two sisters of the half blood. It seems clear from these devises that the testator did intend to devise to his father for life, and then to his sisters in fee, not subject to any contingency, *all* the estates enumerated in the devises over to the sisters. This is the legal construction. The devises over showed that

(I) This was comprised in a separate settlement on the second marriage. It was not thought necessary to encumber the statement with the particulars of this settlement.

although he had Arnscott, it was not within his contemplation at the time, and accordingly, a month afterwards, by a codicil, he gave that estate to his father, in fee. What then was the testator's intention, to be collected from the face of his will? He clearly provided for his father's surviving him, as well as for his surviving his father. But the codicil proves that he anticipated the event, and considered that his father would survive him. His was the will of a bachelor. It made no provision for a future wife or children. Did he then mean simply to dispose of *his interest* in the settled estates, that is, an estate in remainder in tail male in the principal estates, which would cease with his death without such issue, and which could not be affected by his will, or the equitable estate under the agreement, which he knew would cease in the very event for which he had provided, viz., his own death in his father's lifetime. It seems clear that he meant no such thing. What he did intend was to dispose of the settled estates as if they were part of his property; he made no distinction between them and the estates of which he was seised in fee; and he made no distinction between the Salisbury-court house, which was not comprised in the deed of 1766, and the other estates which were comprised in that settlement. He meant his father to take them all for life, and of course *under his donation.* He could not intend to leave his father to contest the question of right (if any contest could have been raised) to the Salisbury-court house, but he gave it to him for his life. The father could not take all these estates, according to the clear gift of the son, without a case of election being raised. For the son having given property within his own disposition to the father, gave the father's property to him for life only, with a remainder over. The devise of all *other* estates which descended or came to him, or which should descend or come to him from his father, created no real difficulty. They could not affect the previous clear gifts by name of the settled estates: the words were in the past as

well as in the future tense; they could not alter the previous absolute gifts, without reference to any contingency, into gifts, upon the contingency of the son surviving his father. But for the doubts entertained by such high authorities, I should have considered it clear that the will, on the face of it, raised a case of election. We cannot fail to distinguish it from the case of Lord Rancliffe *v.* Parkyns, which we have already considered.

10. Sir Henry accepted all the benefits, which were extensive, under his son's will and codicil, and proved the will and codicil; and amongst other acts, in May 1770, mortgaged the Arnscott estate in fee, describing himself as devisee under his son's will, and covenanting that he was seised in fee. But because Sir Henry had a few months after his son's death by his will disposed of the settled estates, it was considered that he had not elected to take under his son's will, and it was held that in every view a new case of election was raised by his will, and that the two daughters Margaret and Ann, by acts of ownership over the estates devised by him, in the character of his devisees, had elected to take under it. This was so determined, although Sir Henry expressly gave by name various of the properties, to which he could only have become entitled as devisee of his son, and actually gave some of them as property to which he was or might become entitled under his son's will. But his will was treated as evidence to show that he acted as much in opposition as in conformity with his will. The daughter Margaret, in 1780, devised by name her moiety of the estates which her brother John gave to her and her sister, to her sister Ann in fee, and Ann by her will, in 1811, devised the estates by name. But the former will was hardly adverted to, and the latter was considered to have come too late, as Ann had already concluded herself by acts amounting to an election. Time was also relied upon, although the daughters were really during the whole period in possession of the estates to which they were entitled, under their brother's will, if a case of election

were raised by that will, and the father had elected to take under it. It would be profitless to pursue the investigation of this case further.

11. As to satisfaction: we may refer to Grigby *v.* Powell (*h*); the wife was entitled under her marriage settlement to a legal jointure rentcharge of 1,000 *l.* a year, issuing out of the mansion house and park, and several terms, with the usual powers of distress and entry, and a term of years was limited to trustees for securing it. The husband retained the fee, and by his will gave to his wife for her life his mansion house and park, and directed that timber should be cut off his other estates to pay the expenses of repairs, painting and glazing, and insurance. And he confirmed the settlement made on his marriage with his present wife. He gave an annuity to his sister, to be paid out of the rest of his real estates in Suffolk; and he directed a life annuity to be paid to the widow of a bailiff, and that she should be permitted to live without rent in the house she then resided in. And subject to those two annuities, "and other conditions above specified," he gave his real estates in England after his death, and also the abovementioned hereditaments so given to his wife for her life, after her decease to his nephew in fee. The paintings and portraits in the house were to be enjoyed by his wife for life, and after her death to go with the house and furniture, and the rest of his personal estate he gave to his wife. Without deciding whether or not the 1,000 *l.* a year rentcharge was merged, it was decided by the Vice Chancellor, Sir John Leach, and his decision was affirmed by the House of Lords, that, upon the manifest intention, the widow was entitled to the whole 1,000 *l.* a year, payable out of the portions of the estate not devised to her, and was to hold the estates devised to her, not subject to contribution.

(*h*) 5 Sim. 294; 3 Cla. & Fin. 200; 9 Bligh, N. S. 646. See Blake *v.* Bunbury, 1 Ves. Jun. 514.

12. There is an election of a different nature, viz. where land is converted into money, or money into land, by the direction of a testator; there the party entitled to the land or fund absolutely may, before the property is converted, elect to retain it in its original state. Although trustees be directed to lay out personalty, either in the purchase of lands of inheritance, or at interest, as they shall think most fit and proper; yet if the limitations are adapted only to real estate, so as to manifest the testator's intention that land shall be purchased, the money must be considered as land, although it be not actually so invested by the trustees. But if a testator clearly manifest an intention that the trustees shall have a discretion, the Court cannot control that discretion (*i*).

(*i*) Cowley *v.* Hartstonge, 1 Dow, 361; and see Cookson *v.* Cookson, 5 Beav. 22; 12 Cla. & Fin. 121.

CHAPTER III.

OF POWERS.

SECTION I.

WHAT ACTS THEY AUTHORIZE.

1. *Discretionary power not controlled.*
2. *Cowley* v. *Hartstonge: money to be invested in land or at interest, real estate on intention.*
3. *Grounds of decision.*
4. *Power to revoke lands of given value according to leases, valid over lands not in lease.*
5. *Ledwill* v. *Holland accordingly.*
6. *Sheehy* v. *Muskerry, whether general power of leasing to be restrained; proceedings in Ireland.*
7. *First appeal to D. P. and further proceedings in Ireland; second appeal, and opinion of the Judges that the power was not to be restricted.*
8. *Last decree reversed accordingly in D. P.*
9. *Nugent* v. *Cuthbert: leases in reversion valid, where.*
10. *Reasons on both sides.*
11. *Clark* v. *Smith: power to lease for lives or years, lease for lives with covenant for perpetual renewal bad.*
12. *Lease for lives or 31 years, which shall longest continue, valid.*
13. *Power to grant building leases; a lease without a covenant to build, bad.*
14. *Ward* v. *Hartpole: power to raise money in any manner; lease for lives for a fine renewable for ever at a rent valid.*
15. *Lord Mansfield's opinion as to collusion or adequacy of rent.*
16. *Blake* v. *Marnell: power to raise a sum of money; a grant of an annuity valid.*
17. *Observations on the case.*
18. *Jointure under power in English currency payable in Ireland.*
19. *Trevor* v. *Trevor; power to jointure to extent of one-fifth of ordinary annual rental, land tax, &c. to be deducted.*
20. *Grounds of appeal, and observations thereon.*
21. *Where fund may be appointed to an only child.*
22. *Cholmeley* v. *Paxton: sale by trustees under power of sale of the land; by the tenant for life of the standing timber bad.*
23. *And no relief for purchaser in equity.*
24. *Where legacy duty payable by appointees.*

WE are now to consider cases which are common to both settlements and wills, of which we have already treated, viz. cases arising out of powers.

1. If a *discretionary* power be given to trustees to invest money in the funds or in the purchase of real estate, equity will not control them in the *bonâ fide* exercise of the power. But the power or trust, although in terms giving an option, may in its true meaning impress the fund ultimately with the character of money or land. And where the trustees having the power have not exercised it, a court of equity will impress the fund with whichever of the characters will best effectuate the intention of the author of the trust.

2. Thus, in Cowley *v.* Hartstonge (*a*), the testator, after giving real and personal estates to trustees, to pay a legacy and a life annuity, declared the trust to be for laying out the residue of the monies either in the purchase of lands of inheritance or at interest, as his trustees should think most fit and proper. And after giving a life interest in the rents and interest, he appointed his trustees to convey and assign his real estate, the monies bequeathed, or such estate as should be purchased for the same, to uses in strict settlement, with the ultimate limitation to his own right heirs, executors, and administrators, for ever, and when his trustees should invest his personal estate in lands of inheritance, the tenants for life were to have certain powers of leasing. The trustees renounced. The Master of the Rolls of Ireland held that the personal estate was not impressed with the character of real estate. Lord Chancellor Ponsonby reversed this decree, and held that it was to be deemed real estate, and his decree was affirmed by the House of Lords upon the advice of Lord Eldon, C., and with the concurrence of Lord Redesdale and Lord Carlton. Lord Eldon considered that the discretion was purely personal in the trustees, and the Court had to consider what was a proper execution of the will when the trustees had refused to act or to exercise any discretion on the subject.

(*a*) 1 Dow, 361. As to the equitable jurisdiction where the conversion has not taken place, see Casamajor *v.* Pearson, 8 Cla. & Fin. 94; as to a discretionary power, see Leases, sect. 4, pl. 2, *infra*.

The testator gave his real and personal estate under the various limitations of his will, *and to these limitations the discretion given to his trustees must be held to refer.* He meant his real and personal estate should go to the same person. Lord Redesdale observed that in the exercise of the discretion, it was evident the testator intended that the money should sometime or other be invested in land, and where under such circumstances an option was allowed, it must be understood with reference to the testator's intention, unless where the words were so express and clear that the design to give an absolute uncontrolled discretion could not be misunderstood.—The trustees were bound to consider all the limitations of the will and give effect to them, and were therefore bound to lay out the money in land as they could not give effect to the limitations without so vesting it: Lord Carlton observed that the great object of the testator was to create a succession of estates tail, and for that purpose his intention clearly was that the personal estate should accompany the limitations of the real property. It was clear that the direction was to be executed in the most fit and convenient manner according to the intention of the testator.

3. The case appears to have been decided upon the ground that the discretion remaining still to be exercised, the House, sitting as a court of equity, was bound to exercise it in the manner most conformable to the testator's intention. Beyond that, the opinion of the law Lords appears to have been that the trustees had they acted would have been bound ultimately to invest the money in land.

4. Where by settlement a power of revocation is given over part of the lands of a given annual value, as ascertained by leases having a certain term to run, yet upon the general intention expressed, the power may be exercised over a portion of the lands of the prescribed value, although not under lease: the reference to leases being deemed only

one mode of fixing the value, and not as a condition, and such a construction must prevail at law as well as in equity.

5. This was decided in Lidwill *v.* Holland (*b*), where in a settlement on the father for life, remainder to the son for life, with remainders over in strict settlement, a power of leasing was given to the father over *part* of the property at rack rent, for three lives, or 31 years, and a power was given to the son when in possession to revoke the uses as to so much and such part of the premises as should be then in possession of any one or more tenant or tenants, by virtue of any one or more lease or leases, whereon a rent or rents not exceeding 300 *l.* by the year on the whole should be reserved during the continuance of such leases, so as there should not at the time of such revocation be less than 20 years or three lives unexpired of such lease or leases, and the revoked lands were to vest in the son, his heirs and assigns. *It being the meaning of the parties that the son should at any time after he came into possession have an absolute power and dominion over so much thereof as should be of the clear yearly value of* 300 *l., and be at full liberty to dispose of the same as he should think proper.* The son when in possession exercised his power over land of the value of 300 *l.* a year, and the deed recited that the lands in question were then actually leased to solvent tenants who had more than 20 years or three lives then to run of their leases, and that the lands produced a profit rent of the clear yearly value of 300 *l.*, or thereabouts (1). This recital was false, as all the lands were out of lease with the exception of a portion let for 8 *l.* per annum, the lease of which corresponded with the description in the power. The Court of Exchequer in Ireland held that the power was well executed, and their decree was affirmed in the House

(*b*) 2 Bligh, 100.

(1) Stated *arguendo*, 2 Bligh, 115, although it does not appear from the statement of the deed in the report, p. 182, but the statement in the text is correct according to the Printed Cases.

of Lords upon the advice of Lord Eldon, C., and Lord Redesdale.

6. In the last case, the power in favour of the intention was enlarged by construction. In the case of Sheehy *v.* Muskerry (*c*), the struggle was, whether general words in a power of leasing should not be restrained upon the alleged intention. In a post-nuptial strict settlement of the wife's estates, Sir Robert Tilson Deane, the husband, was the first tenant for life, and a power was given to him at all times during his life to demise all or any part of the estates for any time or term of years or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases respectively from time to time, to make new or other leases thereof in manner aforesaid, and with or without fine or fines, as he should think fit; and power was given to him to raise, by sale or mortgage, 20,000*l.*, and a power to encumber the estate with any sum or sums for the younger children. By an endorsement, a power of leasing was given to the children of the marriage for three lives, or 31 years, in possession, at rack rent, without fine. Three leases were granted by Sir Robert, in which his wife joined, and he covenanted to levy fines, but none was levied. By the first lease, for 1,000*l.*, part of the lands was demised for 999 years, at 20*l.* a year, subject to a lease of a portion made by a former owner. By the second, for 2,000*l.*, other part was demised for 999 years, at 150*l.* a year, with permission to the lessee to burn the soil, and to surrender the lease at the end of every year of the term, upon giving six months' notice. By the third, for 5,780*l.*, other part (together with some land *not* comprised in the settlement, subject to the unexpired terms of different leases then subsisting,) was demised for 999 years, at 50*l.* a year, without impeachment of waste, and with power to cut

(*c*) Llo. & Goo. t. Sugden, 185; Llo. & Goo. t. Plunket, 182, *nom.* Muskerry *v.* Chinnery, 7 Cla. & Fin. 1; Macl. & Rob. 493; and 2 Jebb & Symes, 300; Append. 2 Sugd. Pow. 572.

and carry away the timber. A bill was filed by the son of Sir Robert to impeach the leases as not warranted by the leasing power, and as being fraudulent and void against the remainder-men under the settlement, and also to impeach a sale of the fee, under a decree of the Court of Exchequer. A case was directed by Lord Plunket, C., to the Court of Common Pleas in Ireland. The Judges of that court certified that the leases were not warranted by any power contained in the settlement. The case then came before Sir Edward Sugden, C., and he called to his aid Chief Justice Doherty, who had joined in the certificate, and Chief Baron Joy, but he ultimately disposed of the case upon the ground that a compromise having been made with the purchaser of the reversion, who did not appear before the Court, there was no equity to impeach the leases; that is, that a seller cannot set aside a lease in equity after he has sold the estate subject to the lease. But the Chancellor said that he should have come to the same conclusion if that point had not existed. He expressed a decided opinion that the general terms of the power authorized the taking of a fine upon any lease, whether an original lease or the renewal of a lease, and whether granted under a covenant for renewal or not, and that he had no authority to restrict them. He was authorized by the Lord Chief Baron to state that he entirely concurred with him in that construction; and he was justified in stating, on the part of the Lord Chief Justice of the Common Pleas, that the arguments in the Court of Chancery had made a strong impression on his mind. The term might be 10,000 years, and the rent a peppercorn; the power being unlimited, there was no objection to the power to commit waste, nor to the power to surrender, nor could the last lease be impeached because it comprised lands not in the settlement (*d*). This decree was reheard before Lord Plunket, C., who held that, under the circumstances, the validity of the leases might still be adjudicated upon by the

(*d*) Llo. & Goo. t. Sugd. 185; 2 Sugd. Pow. App. 572.

Court, and he was of opinion that the purchaser, subject to leases, does not bargain for or gain the right to meddle with them. The vendor does not part with his right to set them aside. The lessee is no party to the contract, nor does he give any consideration for gaining an indefeasible title to that to which before he had not a valid title. He entirely concurred with the unanimous opinion of the Court of Common Pleas, and he entirely concurred with the judgment of that Court, that the natural construction of the clause, without any transposition of the words, was that the power of taking fines was applicable to the case of the leases mentioned before the words "with or without any fines," and those were clearly the leases to be made on the determination of the leases first mentioned. The decree was reversed, and it was declared that the three leases were not, nor was either of them, valid at law, or warranted by any power in the settlement, and that there was no ground for sustaining them on equitable principles, therefore they were declared void and set aside (*e*).

7. From this decree there was an appeal to the House of Lords, and upon the advice of Lord Cottenham, C., the House, without deciding the question upon the validity of the leases, declared that it was competent for the Chancellor of Ireland at the time of making the decree of 1835, to adjudicate between the parties as to the validity of the leases. And it was ordered that, with this declaration, the cause should be remitted back to the Court of Chancery in Ireland, to be heard upon that question, and to make such decree as should be just (*f*). Upon the case coming again before Lord Plunket he sent a case to the Court of King's Bench upon the validity of the leases, and Chief Justice Bush, Mr. Justice Burton and Mr. Justice Perrin, certified that the three leases were not, nor was any of them, warranted by any power in the settlement. Mr. Justice Crampton

(*e*) Llo. & Goo. t. Plunket, 182.

(*f*) 7 Cla. & Fin. 1; Macl. & Rob. 493; see 4 Dru. & War. 181.

certified that, in his opinion, all the three leases were warranted by the extraordinary leasing power in the settlement (I). Upon the return of this certificate, Lord Plunket once more declared the leases invalid, with consequential directions. From this decree there was an appeal to the House of Lords, and the question having been argued before the House, with the assistance of eight Judges, the opinion of the Judges in favour of the validity of the leases was delivered by Mr. Baron Alderson in the following words :—

"The question proposed by your Lordships to her Majesty's Judges depends on the proper construction of the power given by the deed of settlement dated the 25th May 1779, to Sir Robert Tilson Deane; for if all or any of the three leases dated the 26th August 1779, 28th October 1779, and 14th June 1780, be a valid execution of that power, it is clear that such lease or leases is or are valid at law. There is no case, we believe, to be found in our books in which a lease conformable to the literal tenor of the words in which the power is given has been held invalid at law on the ground of any supposed or real hardship thereby inflicted upon the remainder-man; and it would be strange if such a case could be found, for as the remainder-man takes what is given to him subject to the power, he must take the advantage *cum onere*, and has no reasonable ground for complaint if that happen which the framer of the power who had the *jus disponendi* contemplated. But undoubtedly there are several cases to be found in which the exercise of a power not literally and in terms executed has been proposed to be supported as being a substantial exercise of the authority given, and there the general intention of the donor of the power, and the advantage or injury arising therefrom to the remainder-man, have been looked at for the purpose of solving the question before the Court.

"And in all cases, in order to determine what is the real

(I) See 1 Sugd. Pow. 526, where the opinion of the three is stated by an oversight to be in favour of the leases.

meaning of the words of the power itself, it must be competent for the Court to look to the whole instrument in which it is found, and to examine and consider the consequences to the remainder-man and to the other objects of the deed, for the purpose, if the words be ambiguous, of adopting that construction of them which may produce the least inconvenience, and best harmonize with all the other provisions which the parties have thought proper to make. Of this the case of Talbot *v.* Tipper is an instance. There, though the power was to make leases with or without fine, and reserving such rents and services as the donee of the power should think fit, a lease without reserving any rent, though certainly not according to the literal tenor of the power, was, on examining the whole instrument, and looking to the real intention of the donor of the power, held to be a valid lease.

"In considering this power, therefore, we shall first examine the words themselves, and then, but only if the words require it, look to the other parts of the deed for the purpose of explaining them. The power itself, which is found in a settlement made after marriage of the wife's property, and a settlement, no doubt, for valuable consideration, is in these words: 'Provided also, and it is agreed by and between the parties to these presents, that it shall and may be lawful to and for the said Robert, from time to time, and at all times during his life, to lease and demise all, every, or any part or parts, parcel or parcels of the aforesaid towns, lands, tenements, hereditaments, and premises, for any time or term of years or lives, and with or without covenant for renewals, and in case of determination of all or any of the aforesaid lease or leases respectively to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as he shall think fit.' Now, we think that the natural and ordinary meaning of these words imports that Sir Robert should, as he should think fit, make leases of all or any part of the premises; that

such leases should be, at his pleasure, for any term of years or any lives; that such leases should be with or without covenants for renewals, as he might think preferable; that on the determination of such leases similar leases should be granted afresh; and that all such leases, whether original or renewed leases, should be, at his discretion, with or without fines. The words, 'as he shall think fit,' apply clearly to every clause in the power; and the words, 'with or without fines,' apply also, as we think, to each of the two classes of leases, original or renewed. No doubt such a power would enable Sir Robert to deprive the other parties to the deed, and those interested in remainder, of advantages which, but for the power, would have come to them; but this is in effect consequent in some degree upon the exercise of all such powers; and precisely the same consequences will in this case follow if we adopt that construction of this power which by the words, 'with or without fines,' are confined to the renewed leases alone; for if this construction were adopted it would equally be in the power of Sir Robert, by granting an original lease for a short term, upon its determination to grant a lease for a long term upon a fine, thus producing to the remainder-man the same inconvenience practically which would arise from granting an original lease taking a fine; or he might grant a long lease, at a peppercorn rent, to a trustee for himself, and then dispose of that lease for his own advantage and benefit. But it is suggested that the clause as to fines may be applied to the covenant for renewal alone. This construction, however, takes the words very far from their natural import, and is so far fetched and difficult to be understood that we cannot adopt it, even if it did not, like the others, labour under nearly the same difficulties as to the situation in which it leaves the remainder-man. We think, therefore, that under this power Sir Robert Tilson Deane might well make a valid lease of any part of this settled estate for any period of years or for lives, at his pleasure; that

there is nothing in the power to limit him as to the rent; that he was therefore at liberty to take a rack rent without a fine, or any other rent with a fine, and upon determination of any such lease to renew it on the same or similar terms. The parties by whom the settlement was made had the complete *jus disponendi*, and they have chosen to give this unlimited power, knowing, as they clearly did, and as appears from the endorsement on the settlement, how to frame a limited power when their intention was to give one. For there they require the lease to be in possession, and not in reversion; they limit the term; they direct the rent to be the best that can be obtained, and they exclude fines altogether. These limitations of the power thus imposed appear to us strong circumstances to show that, inasmuch as in the previous power they are not found, the intention of the donors of that power was that it should be unlimited. And the cases of Long v. Long, 5 Ves. jun. 445; Attorney General *v.* Moses, 2 Madd. 309; and the Attorney General *v.* Wray, Jacob, 307, are authorities in point to show how such powers are to be construed. We think, therefore, that the first objection taken to these leases, which applies to all, viz. that they are made upon a fine given, is not valid. This power authorized a lease with or without a fine.

"The second objection is, that these leases do not purport to be made under the power; but this objection is answered by the case of Tomlinson *v.* Dighton, 10 Mod. 35. The opinion of Parker, C. J., in that case, is exactly in point with the present one. This objection, therefore, also fails.

"The third objection was, that these leases included as well property in possession as property already under lease, and that as to the latter they were therefore leases in reversion. But there are two answers to this objection; first, the power is general, and is not confined to leases in possession alone, as the limited power endorsed on the settlement is. But, secondly, this is, as to the property under

lease, only a concurrent lease; and such a lease, if made for a period within the authority given by the power, is clearly valid. The instance of concurrent bishops' leases manifestly shows the principle, and demonstrates that such leases, if they do not exceed 21 years, are within the statutable power conferred by 1 Eliz. c. 19. Those cases in which leases in reversion have been held invalid executions of the power are cases where, from the commencement of the lease at a day subsequent to its date, the land is rendered liable to the burden of the lease for a longer period from the date when the lease was executed than was warranted by the power given. Such are the cases of the invalid concurrent ecclesiastical leases mentioned in Bac. Abr. So in Doe *v.* Hiern, 5 M. & S. 40, under a power to lease for 99 years, determinable on the death of one, two, or three lives, a lease was made to commence after the death of J. L. and M. R., for 99 years, determinable on the death of E. H., and it was held bad. For, as Lord Ellenborough said, it certainly was not the intention that the tenant for life should do more than incumber the estate to the extent of a term of 99 years, determinable on three lives; yet in that case, supposing the continuance of E. H.'s life, it is obvious that such a lease, if valid, might have exceeded 99 years by the period during which J. L. and M. R. might have continued to live; or still further, it was an estate for 99 years determinable, but commencing at a future indefinite period, namely, at the death of two subsisting lives. This lease, however, may be, under the power, for any term of years, and consequently the term cannot here be exceeded, being by the power unlimited.

"These three objections are all that apply to the lease dated 25th August 1779. We are therefore of opinion that that lease is at law valid.

"The fourth objection, that the lessee shall be at liberty, on giving six months' notice, to surrender his lease, applies to the lease of 28th October 1779 alone; but we think that it

is no objection to its validity; the unlimited power of leasing is an answer to it; for a lease for a term of years, with a clause enabling the tenant to surrender, is still a lease for a term of years; and the donor of the power has not thought fit to impose any such limitation as that suggested; neither is it very easy to see how such a clause in a lease upon which a fine of 2,000*l.* has been paid is at all likely to be acted upon to the prejudice of the remainder-man, even if that were, which we think it is not, the proper criterion. No doubt, if a power be given to make leases containing the usual reservations and covenants, and such a covenant to surrender were shown to be an unusual covenant, a lease containing it would be an invalid execution of such a power; such was in truth the case cited at the bar of Jack *v.* Creed, 2 Huds. & Br. 128; but where the power contains no such limitation we think there can be no such objection made.

"The same answer, that the power contains no limitation, applies also to the objections that the leases of 28th October 1779 and 14th June 1780 contain a permission to graph or burn the land, and that in the latter lease the tenant is also allowed to commit waste, and to cut timber. As to graphing, it is by no means clear that in certain cases it may not be advantageous to the land. In the Irish statute on the subject it is only called bad husbandry, and is made the subject of a fine, unless done by the landlord's consent. This shows that the Legislature contemplated the possibility of his giving his consent; and here by the lease made under an unlimited power he has done so, probably because he did not think it would be prejudicial to the land. As to waste, that is, in an unlimited power like the present, entirely in the discretion of the donee of the power; a discretion in the case of tenants in tail recognized and restrained by the statute of Hen. 8. And as to cutting timber, it is only necessary to advert to the duration of the lease, 999 years, which is admitted to be in conformity with the power, to see that it is a very reasonable stipulation.

"The only remaining objection applies to the lease of 14th June 1780 alone. This lease contains land not within the power, as well as land subject to it, and only one rent is reserved for the whole. Now, if the power had contained any such limitation as that the best, or the ancient, or the usual rent, should be reserved, this would have been a good objection; for in such a case it ought to appear by the lease itself what is the rent reserved for the land subject to the power, that the remainder-man may judge of it, and see whether the power has been duly executed; but here no restriction is found in the power; any rent will satisfy it. Inasmuch, therefore, as, under this reservation, it is clear some rent is reserved, and any rent is a compliance with the power, we think it is sufficient. Undoubtedly the remainder-man may be subject to some inconvenience, both in this case and in the case of the concurrent leases; but such an inconvenience does not make the execution of the power in either case invalid.

"I have now gone through all the objections to these leases, assigning the reasons which have occurred to my mind why they are all untenable, and for which reasons I alone am responsible. But I am authorized by my learned brethren to express our unanimous opinion on this subject, that in answer to your Lordships' question we think that each and all of the three leases dated 25th August 1779, 28th October 1779, and 14th June 1780, is and are valid at law."

8. The case stood over a long time for the judgment of the House, when finally in 1848 the decree of Lord Plunket was reversed upon the advice of Lord Cottenham, C., who entirely concurred with the judgment delivered by the Judges; the original bill stood dismissed as against the lessees with costs, according to the decree of Lord Plunket's predecessor in 1835, and the cause was remitted to the Court of Chancery in Ireland (*g*). It is to be regretted

(*g*) 25 May 1848.

that the House did not call in the Judges and dispose of the case upon the original appeal.

9. In the case of Nugent *v.* Cuthbert (*h*), the question turned upon the right to grant a reversionary lease under a certain power of leasing. William Galway made a lease of part of his estate for 82 years at a yearly rent. John Galway, who was tenant for life under William's will, made a lease of the residue of the estate for 31 years at a yearly rent. John and his son Edward, who was tenant in tail under William's will, suffered a recovery, and settled the estate (subject to a confirmation of the lease for 31 years) in strict settlement. There were two powers of leasing. The first, upon which the question depended, was a joint power to John and his son Edward during their joint lives to lease the premises, or any part thereof, to any person or persons for any number of lives or years, with covenants for renewal for ever, so as there were received during the continuance thereof, the ancient or accustomed rents or more, and so as none of the said leases were made dispunishable of waste by any express words, and so as in every such lease there were contained a clause of re-entry for non-payment of the rent, and so as the lessees executed counterparts. The other power was to the tenants for life in succession to lease for three lives or for 31 years in possession, and not in reversion, at rack rent without fine, and so as none of the said leases were made dispunishable of waste, and so that every lease contained a clause of re-entry for non-payment of the rent, and so as the lessees executed counterparts. John and Edward, under their power, made a lease of the property comprised in the 31 years' lease, but subject to that lease at the same rent during the demise as was reserved thereby (being, it was stated, more than the ancient rent, and as much as was reserved on the lease for 31 years) for three lives renewable for ever; and power was reserved to enter and distrain for the rent

(*h*) Printed Cases, D. P. 1822.

if it should be 21 days in arrear; and for want of sufficient distress, then power to re-enter generally. The lessee covenanted to repair (casualties of fire and war excepted). John and Edward made a lease to the like effect of the lands comprised in the lease granted by William Galway. John and Edward both died. The next remainder-man impeached the leases. Upon a special verdict the Court of Exchequer in Ireland decided that the leases were invalid, and gave judgment unanimously accordingly for the plaintiff in an ejectment on the demise of the tenant in tail under the settlement. But upon a writ of error to the Exchequer Chamber that judgment was unanimously reversed. And upon an appeal to the House of Lords the judgment of the Court of Exchequer Chamber (reversing the judgment of the Court of Exchequer) was affirmed, so that the leases were held to be valid. The law was elaborately discussed in the reasons submitted to the House on both sides.

Against the validity of the leases it was insisted in the reasons signed by the late Mr. Justice Richardson, and by Mr. Townsend, the late Master in Chancery in Ireland, that the power requiring that the lease should contain a clause of re-entry for non-payment of the rent showed that the leases intended to be authorized by it were leases of land, in which the right of entry could be effectually reserved, and not leases of reversions on which there could be no entry, and in which the mode of taking benefit of a condition broken is not by entry but by claim. Co. Litt. 218, a; Plowd. 433; 6 Ann, c. 10, s. 9 (Irish Act). The settlors were bound by the limited powers they had reserved. Whatever benefit was to be derived from granting perpetuities they might have by granting leases in reversion, viz. to commence after the expiration of the existing leases. These would be demises of the land, to which the powers of distress and re-entry would be incident, or might be annexed, and which during the existing leases could not interfere with the rights of the inheritor. It had been objected that this

construction would restrict them from making freehold leases, for that such could not be made to commence *in futuro*. To this objection the answer was, that a freehold lease to commence *in futuro* might be granted under a power. They relied also as objections, upon the clause of distress requiring an arrear of 21 days, and the clause of re-entry being only in want of a sufficient distress; and lastly, upon the exception in the covenant to repair of casualties of fire and war. These words exempted the lessee from responsibility to repair such casualties (Stephenson's case, 1 Lev. 324; Cole's case, 1 Salk. 196; Hill *v.* Carr, 1 Cha. Ca. 294; Duke of St. Albans *v.* Ellis, 16 East, 352), yet such casualty not repaired was waste, and might be punished as such, though the lease were expired; Co. Litt. 53, b; 2 Ro. Abr. 830, pl. 9; Co. Litt. 285, a; but by force of this covenant such waste would be dispunishable, for waste is a *tort*, and nothing can be punishable as such, which is permitted by the contract of the parties; 52 H. 3, c. 23, s. 2. The expression by express words in the power meant to distinguish between leases dispunishable of waste by the provision of the parties and those which are so by operation of law. It was said that the covenant only did what was already done by statute as to fire, 6 Ann, c. 13; 14 Geo. 3, c. 78, s. 86, 101, which does not save the action of waste; Harg. n. 5; Co. Litt. 54, a; but the Irish Act, 2 Geo. 1, c. 5, s. 2, does save the action of waste, being an action between landlord and tenant.

10. On behalf of the respondents the reasons signed by the late Lord Gifford and Mr. Justice Littledale insisted that the power was intended to warrant leases of the reversion; the property consisted of reversions expectant upon long terms of years, the leases were noticed in the settlement, and the power authorized the donees to grant leases at any time or times during their joint lives. That the intention was shown by contrasting the terms of the two powers of leasing; the first authorized covenants for

renewal, and the performance of such a covenant would probably have led to a lease not only of the immediate reversion but of future reversions, for the original lessee having a right to under-lease, and such under-lease not being surrendered upon the renewal of the original lease to the original lessee on the dropping of either of the lives, such renewed lease would in fact be nothing but a lease of the reversion. It had been repeatedly decided that a power of leasing lands already in lease authorizes a lease of the reversion, notwithstanding the existence of the former lease. Fox *v.* Collyer, 1 And. 65, pl. 4; Moo. 107; Read *v.* Nash, 1 Lev. 147; Wilson *v.* Sewel, 1 Blacks. 617; Goodtitle *v.* Finucane, Dougl. 564; Doe *v.* Calvert, 2 East, 276; Roe *v.* Prideaux, 10 East, 185. But it was contended that where a power authorizes freehold leases to commence in possession or in reversion, the terms of the power necessarily authorize concurrent leases, that is, leases of the reversion, and further, that a concurrent lease is the proper mode of exercising such a power. Whitlock's case, 8 Rep. 69, b; Winter *v.* Loveday, Com. 37; 2 Salk. 537; 6 Mod. 578; 12 Mod. 150; Carth. 429; 1 Lord Ray. 269; Roe *v.* Prideaux, 10 East, 183; Sugd. on Pow. 185; Opie *v.* Thomasine, 1 Lev. 167. In most cases where the validity of a lease of the reversion had been denied, the power was to lease for a definite term of years, and the lease, instead of being a present interest by way of concurrent lease of the reversion, was a lease by way of *interesse termini* or reversionary lease, and extended the term of enjoyment to a period beyond that prescribed by the power; Wilson *v.* Sewel, 1 Blackst. 626; 1 Lev. 148; Moo. 107. In this respect such a lease was a contravention of the power. It is unnecessary to state their reasons why the objections to the 21 days and the want of a distress should not prevail (*i*). To the objection that such clauses in leases of the reversion were ineffectual for the purpose of

(*i*) Vide *infra*, s. 2.

securing the rent, it was answered: 1, That the donees of the power having complied with the terms of the power were not answerable for the inefficacy of the remedy; but, 2, That such clauses were effectual by way of claim, as the means of putting an end to the lease if the rent should not be paid. They could be exercised by way of claim on the land, though the party could not lawfully enter by reason of the prior estate, so as to have a continuing possession; Co. Litt. s. 419; Moo. 466; Cholmley's case, 2 Rep. 53, b; 1 Rep. 94; Co. Litt. 218; Shep. Touch. 153, 154; Plowd. 133. Finally, as to the exception in the covenant to repair; it was said that the exception out of the covenant gave no exception from the liability to commit waste. The restriction of the power was against a licence to commit waste; against waste by express words, and not against regulations respecting repairs. Besides, the lessee came in under the power, which did not require any covenants, so that the covenant must be considered merely as an agreement between the lessor and lessee, and not as creating an exemption from waste, for in that case it must be void against those in remainder (*k*); neither would the exceptions amount to a bar against an action of waste or prejudice any legal remedy. Besides, the exception was of that which did not amount to waste, for the word casualty must be construed casualty without default of the tenant; Co. Litt. 53, b, citing Fleta; 2 Inst. Stat. Marlb. and Stat. of Gloc. These leases should be construed not dispunishable of waste, particularly as there appeared no intention to commit any fraud on the power.

11. In the case of Clarke *v.* Smith, in Ireland, a leasehold for lives, with covenant for perpetual renewal, was settled strictly on marriage, and power was reserved to the husband, the tenant for life, and all other persons to whom any use was thereby limited, when in actual possession, to lease the lands or any part thereof for any number of lives or

(*k*) See Sandham *v.* Medwin, 2 Sugd. Pow. 133.

years *consistent with their respective interests therein* (I), to commence in possession, and so as the best rent were reserved, without taking a fine. The tenant for life made a lease for three lives at a rent, with a covenant for perpetual renewal on payment of 5 *l.* as a fine upon every life. Lord Plunket, C., sent a case to the Common Pleas, and the Judges certified their opinion that the lease and the covenant for renewal therein contained were warranted by the leasing power (*l*), and Lord Plunket confirmed the certificate, and accordingly decreed a specific performance of the covenant for renewal. Upon an appeal to the House of Lords the decree was reversed, and the bill filed for a specific performance was dismissed with costs upon the advice of Lord Cottenham, Lord Brougham, and Lord Campbell (*m*). They were of opinion that a lease under a power to lease for lives must be confined to lives *in esse;* the attempt, therefore, to extend the estate of the lessee for lives to be named after the death of non-existing lives was not within the power. The tenant for life could not have created such an estate, and the remainder-man therefore could not be bound to give effect to a covenant for that purpose. The power, besides, did not authorize leases in reversion, nor the taking of fines, but required that the best rent should be obtained, which was incompatible with taking a fine. [The taking of a fine was expressly prohibited.] The donee, therefore, could not have granted a lease to commence after the expiration of any of the lives first named, nor could he have taken a fine upon granting any lease. But if this covenant were binding upon the remainder-man, the tenant for life had in effect secured to the tenant of the land a reversionary interest upon pay-

(*l*) Smythe, 367.

(*m*) 9 Cla. & Fin. 126; see 3 Dru. & War. 344.

(I) The House of Lords did not decide upon the meaning of these words; there were other estates comprised in the settlement of different tenures. See 9 Cla. & Fin. 131, 132, 136, 143.

ment of a fine, all which would be in contravention of the settlement and a fraud upon the power.

12. In Long *v.* Rankin (*n*) the power authorized leases of an estate in Ireland for any term not exceeding 31 years, or one, two, or three lives, or for any term of years not exceeding 31 years, or number of lives not exceeding three lives; and a lease was granted under the power for the lives of three persons and the life of the survivor of them, or for the full term of 31 years, which lives or terms of years should longest continue. The Judges were of opinion that there was nothing repugnant in itself or contrary to law in such a limitation. Grants or leases for the life of one or more persons and of the survivor of them, and for a term of years to commence at the death of the survivor, were not unknown in England, and their legality had not been questioned; and as to any consequences that might happen to occur by the death of the lessee or of the persons for whose lives the leases might be made, with a view to the person in whom the interest may vest by operation of law, there did not appear to be any greater difficulty in one class than in the other. And the House of Lords established the validity of the lease.

13. Where a power of leasing was for lives renewable for ever, without fine for the first lease, such lease not to contain or be of or for more land than six plantation acres, at the best rent, with covenants in such lease for building and improvements, and the fine for renewal not to exceed half a year's rent, a lease of a house and garden, together with six acres of land, for three lives, without any covenant to build, was held a bad execution of the power by the Court of Exchequer in Ireland (I), and their decision was affirmed by the House of Lords, Lord Eldon, C., observing that the

(*n*) 2 Sugd. Pow. App. 513. See Fitzgerald *v.* Vicars, 2 Dru. & Wal. 298.

(I) It is stated in 3 Bligh, 124, by mistake, that the bill was filed in the Court of Chancery, and the decree made by Lord Manners.

power was to lease six acres, with covenants for building; that the leases were of houses and gardens together with six acres of land, and containing no covenant for building (*o*).

14. A power in a settlement may, from the extent in which it is given, enable the donee to do the very act which he is prohibited from doing under a limited power in the same settlement; and a power to raise money in any manner will authorize the grant of a lease at a rent for a fine. This was decided in a case of much earlier date than those which it is our object to review (*p*). Hartpole settled an incumbered estate on his marriage, and reserved to himself power to lease for three lives certain, or renewable for ever, at the best rent without fine, and also power, with the consent of trustees and of the lady's father, to raise any sum or sums of money for such uses and purposes as he should think fit. The proper persons gave a consent that Hartpole might, by mortgaging the lands or in any other manner he should think fit, raise any money not exceeding 5,000 *l.* in the whole, which was to be applied towards discharging the debts on the estate, and for such other purposes as he should think proper. Hartpole, in consideration of 300 *l.*, made a lease under the power for three lives renewable for ever, at the yearly rent of 42 *l.* Lord Mansfield, C. J., in advising the House, observed that it was certain that the lease was not within because not made according to the power of *leasing*, but upon the true construction of the power to raise money, and considering the long-established usage in Ireland, he thought that this mode of *fining down* might be one way of raising the money. He was clearly of opinion that by the terms of the power and the trustees' consent he was clearly warranted to raise it by fines. The power was very uncommon; he was enabled to raise *any sum of money* for such purposes as he should think fit,

(*o*) Higgins v. Lord Rosse, 3 Bligh, 112.

(*p*) Ward v. Hartpole, 3 Bligh, 470; see Llo. & Goo. t. Sugd. 227.

with the consent of the trustees. There was no sum mentioned, no particular mode prescribed for raising it, no restriction whatever as to the execution of the power, but that it should be with the trustees' consent. Now this power operated as an exception, and so far as respects the execution of it the power of leasing did not extend or interfere. When the power for raising money was satisfied, then indeed all the leases afterwards made must be in conformity to the terms of the power of leasing. There was no way of raising money but by mortgaging, fining down, or selling: he was left at his option. It could make no difference by what means the money was raised, provided the value was given. He was clearly of opinion that it might be raised by fines, and that so far the lease was a good execution of the power.

15. Upon the questions of collusion and adequacy of rent, Lord Mansfield observed that if there was any collusion between Hartpole and the lessee, or any undue practices on the part of the latter to the prejudice of those in remainder, that would afford a sufficient ground for setting aside the lease. So if there was any fraud in this transaction as to the rent, it being to the prejudice of the heir or person next in remainder, the lease would not be good as against him. Upon the evidence, the lease was set aside upon terms, on the ground of the inadequacy of the rent, and of the lessee having availed himself of the advantage of his situation as agent and solicitor of Hartpole, and thus obtained the lease at an undervalue.

16. A power to raise a sum of money has been held to warrant the grant of an annuity, not exceeding in the aggregate the sum authorized to be raised. By an imperfect marriage settlement (which was considered to operate only as articles), an estate was limited to the usual uses in strict settlement; and after reciting that it might be convenient and necessary for the intended husband, the first tenant for life, to have the power of raising a sum of money, it was

declared that it should be lawful for him to raise or borrow any sum or sums of money not exceeding 1,500*l.* sterling, and that without the consent, approbation, or control of the trustees; and it was covenanted that the tenants for life should not mortgage or sell any part of the estate during their lives, anything therein contained to the contrary notwithstanding. The husband by a deed, in consideration of 744*l.*, a debt due by him, granted to the creditor an annuity of 150*l.* a year, payable out of part of the settled estate, until the said sum of 744*l.* and the costs then due or thereafter to become due should be fully paid off, and no longer, with powers of distress and entry. Lord Manners, C., upon a bill filed, decreed the lands well charged with the 744*l.* (*q*), and upon an appeal to the House of Lords the decree was affirmed upon the advice of Lord Eldon, C., and Lord Redesdale (*r*). It was of course held that although the power was not referred to, the grant would be an execution of it, if in reality authorized by it; but upon the general point of law, Lord Eldon pronounced it to be as difficult a question as almost any he ever met with. At the close of the argument he stated the question to be whether the party having a power to charge the estates with 1,500*l.*, which would make him liable to pay the interest, the person entitled to the inheritance having to pay the principal—whether if this 1,500*l.* was not charged upon all the estates by way of mortgage, but an annuity was granted of 150*l.*, charged on part only of the estates until a sum of 744*l.* should be paid off, *that* could be taken as a good execution of the power—and whether the party having power to raise a sum of 1,500*l.* *by mortgage or sale of the whole estates*, that is, having power to do one thing, and having in fact done another, it is to be held that he meant to do that which he had power to do. Ultimately Lord Redesdale treated the grant as an informal execution of the power. It was an instrument which pro-

(*q*) Blake *v.* Marnell, 2 Ball & Beat. 35. See Lord Redesdale's opinion, ib. 38, n.

(*r*) 4 Dow, 248.

vided that the lands should be charged with the sum of 744 *l.*, and being so, though the mode was not that intended by the settlement, yet a court of equity would make it a charge according to the mode intended by the settlement. Lord Eldon acceded to Lord Redesdale's proposition for affirming the decree, but he said that at the same time it must not be understood that they meant to hold that where tenant for life has a power to charge lands for any given sum, the grant of an annuity out of these lands was *in all cases* to be taken as a good execution of the power. That was not his meaning, nor, as he understood him, that of Lord Redesdale, but merely that in the very particular circumstances of this case it might be so taken. The tenant for life had a power, *in some way or other*, to charge the lands with 1,500 *l.* In what way it was very difficult to say, unless you reject the proviso that he should not sell or mortgage; and it was not impossible that he might have resorted to the mode of execution by annuity, on account of the clause forbidding him to sell or mortgage. He held that the tenant for life intended to execute the power. And, he observed, the mode too would have been the most beneficial one for the inheritance, for if the money had been raised by way of mortgage the principal would have been a charge on the inheritance, and he would have had only to keep down the interest. Lord Redesdale added that the case was totally different from the generality of other cases, for there was no direction how to execute the power. It was merely that he should have power to charge to that amount, and the meaning of the proviso that he should not mortgage or sell, must be that he should not mortgage or sell so as to defeat the provisions of the settlement; otherwise it would be absurd to say that he should have such a power and yet should not mortgage or sell, and probably he might have been led into this mode of execution by this extraordinary proviso. It turned out that by mistake the legal fee had been vested in the tenant for life, and although he would have been bound to make good

the settlement, yet both of the noble lords dwelt upon that circumstance and thought that he could not have been compelled to execute a conveyance according to the settlement without allowing him to charge in this way.

17. In a case in Ireland, the Chancellor observed that in the above case it was decided that under a power of raising a certain sum of money you may limit an annuity or rent-charge, and the House of Lords, considering it an equitable execution of the power, relieved against the defect. He did not see the difference between raising the charge by mortgage and by such an annuity, which was really only a postponed mortgage, securing the payment by annual instalments. Why was it not good at law? No damage could be done, provided the amount of the charge were not exceeded (*s*). It is impossible not to give great weight to opinions so deliberately expressed by Lord Eldon and Lord Redesdale, but the more I consider the case the more I am satisfied that the grant was a valid execution of the power at law (assuming the power to be a legal one), and a benefit to the remainder-man. The point as to the legal operation of the grant under the power did not arise, because the settlement was merely an equitable one. Of course it was no objection to the grant, that it only charged a portion of the estate. And although *in form* it was the grant of an annuity, yet *in substance* it was a mortgage for the 744*l.*, payable by instalments, so as in no case to throw upon the remainder-man more than he ought to bear, but on the contrary throwing upon the tenant for life during his life a portion, or it might be the whole, of the burden which he might have cast on the remainder-man. It was not such a grant of an annuity as a tenant for life ordinarily makes, viz., an annuity calculated to cover a large annual interest and the premium of a life assurance, but the grant of an annual sum till the precise sum borrowed should be paid off. The remainder-man could, it is conceived, have paid off the whole demand at

(*s*) Llo. & Goo. t. Sugden, 227; Llo. & Goo. t. Plunket, 203.

once if he had pleased. Upon the whole, therefore, we may perhaps fairly hesitate before we agree to the rule as laid down in this case in the House of Lords.

18. We may here notice a case (*t*), where in a settlement of English and Irish estates a power was given to grant by way of jointure any yearly rentcharge, to be tax free, and to be chargeable upon any part of the Irish estates, not exceeding the yearly sum of 3,000 *l.* of lawful money of Great Britain, which power was fully executed in the words of the power, but directing the rentcharge to be paid in Lincoln's Inn Hall. The Court of Common Pleas in Ireland, upon a case sent to them by Lord Manners, C., certified their opinion that the jointure being a rent charged on lands in Ireland was payable in Irish currency, and that the same was payable in Ireland, and the Chancellor made a decree accordingly, although, it was said, contrary to his own opinion. Upon an appeal to the House of Lords, Lord Eldon, C., and Lord Redesdale were of opinion that the meaning was to be collected from the settlement, and they held it to be clear that the power was, as it was expressed, to charge so much of lawful money of Great Britain, and therefore it must be paid in English currency, but the payment was to be made in Ireland, and in that part of the appointment in which the donee directed payment in Lincoln's Inn Hall, he had exceeded his power. The decree was reversed as far as it directed the rentcharge to be paid in Irish currency, and it was declared that the rentcharge was to be deemed a charge of lawful money of Great Britain, and the decree was affirmed as far as it declared that the rentcharge was payable in Ireland.

19. In Trevor *v.* Trevor (*u*) an estate was by will directed

(*t*) Lansdowne *v.* Lansdowne, 2 Bligh, 60, 155. See Holmes *v.* Holmes, 5 Russ. & Myl. 660; Cope *v.* Cope, 15 Sim. 118.

(*u*) 13 Sim. 108; 1 H. of L. Cas. 239. *Sup.* Wills, s. 3, div. III. pl. 7; div. VI. pl. 8, 9.

to be settled on one for life, with remainder to his issue in tail male, in strict settlement, and in the settlement was to be contained a power for the tenant for life to jointure any wife or wives at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the settled estates. The Master approved of a settlement in which the power to jointure was for the tenant for life to appoint to his present or any future wife for her jointure any annual sum not exceeding in amount for any such wife one-fifth part of the then ordinary annual rental of the estates, and to be made payable half-yearly or quarterly, and to be issuing out of and charged upon all or any part of the estates. The tenant for life excepted to the report, because the power ought to have authorized him to charge the estates with a *clear* yearly rentcharge of the ordinary annual rental payable without any deduction. Sir L. Shadwell, Vice Chancellor, did not think that the testator meant that the jointure should vary in amount *de anno in annum*, for he said in his will that the jointure should not exceed in amount one-fifth of the *then* annual rental of the estates, that is, the annual rental at the time of appointing the jointure. The word "ordinary," which was used in the will, and which the Master had inserted in the draft of the settlement, seemed to him to have no distinct meaning, and therefore he should reject it. He thought that the "rental" must be taken to be the amount which was receivable by the landlord by way of rent, *after the deductions which tenants are entitled to make.* The word "clear," however, ought to be inserted in order to avoid any question, and then the power to jointure would stand thus: "Any clear annual sum not exceeding in amount for any such wife one-fifth part of the annual rent payable at the time of making the appointment." The exception accordingly was allowed with the following variation of the clause, namely, in lieu of the words "the then

ordinary annual rental of the estates," the words "the annual rent payable at the time of making the appointment," to be inserted.

20. There was an appeal to the House of Lords against the order allowing this exception, because the yearly sum to be appointed ought to be subject to the land tax, or in other words, that the outgoings should be taken out of the gross rental before the division takes place, to ascertain the amount of the jointure. The learned reporter observes (*x*), that the Vice Chancellor's judgment was to that effect. What the reporter understood him to say was, that the word "rental" ought not to be inserted in the order, because it meant the gross amount of the rents which the tenants were liable to pay, and that the word "rent" ought to be substituted for it, in order to express that the jointure ought not to exceed one-fifth of the annual amount *receivable* by the landlord in the way of rent after the deductions usually made by tenants, *i. e.*, it was presumed for land tax, quit rent, and other payments usually borne by landlords. Notwithstanding this clear exposition of the view of the Vice Chancellor, and of the meaning of his order, the appellant argued against the order that the tenant for life should not be authorized to appoint a *clear* yearly sum equal to one-fifth of the *rental* of the estates without any deduction, but that the yearly sum appointed ought to be subject to the land tax; in other words, that the outgoings should be taken out of the gross rental before the division took place, to ascertain the amount of the jointure, whilst the respondent insisted that the Vice Chancellor put the true construction on the power, and that the intention of the testator was that the tenant for life should have power to appoint by way of jointure, a *clear* annual sum to the amount of one-fifth part of the *gross annual rental* of the estate at the time of making the settlement. The words in the will were "the ordinary annual rental of the estate." So that the

(*x*) 13 Sim. 152, n.

appellant appears to have misconstrued the order to his own prejudice, whilst the respondent exaggerated this mistaken view, and put a construction on the order wholly unwarranted by the judgment of the Vice Chancellor, and unsupported by the terms of the order itself. The House of Lords, without at all entering into this point, affirmed the decree. It seems clear that the settlement will only authorize the appointment of a jointure equal to one-fifth part of the *rent* received by the landlord, after the deduction of land tax and the like, but when so fixed it will remain payable at that sum for the whole life *clear* of deduction, obviously because the proper deduction was made once for all when the actual amount was fixed. This view makes the case accord with the previous authorities, to which a contrary construction would have caused it to run counter. The rejection of the word "ordinary" was, we may observe, a strong measure, and it is to be regretted that this part of the order did not attract the attention of the House of Lords. It is a word full of meaning in the passage in which it occurred, and seemingly free from ambiguity. Sometimes a rental is increased by casual payments, which may fairly be deemed extraordinary ones; not ordinarily finding their way into the rental: these the testator intended to guard against being brought into the particular rental out of or in relation to which the jointure was to be allotted. This was a reasonable object: it might have led to some difficulty to distinguish between items constituting an ordinary or an extraordinary rental, but that would not authorize the Court to strike the word out of the will. The House in this respect did not follow the rule which guided it in the decision of the principal point in the case.

21. In Bray *v.* Bree (*y*), a money fund was settled on

(*y*) 3 Sim. 513, *nom.* Bray *v.* Hanmersley, 8 Bligh, N. S. 568; 2 Cla. & Fin. 453. As to the vesting of the portions, in default of appointment, see Reilly *v.* Fitzgerald, 1 Dru. 122, which was appealed to the House of Lords, but the appeal dropped for want of prosecution.

marriage, in trust for all and every the child and children of the marriage in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, or subject to, with, and under such conditions, restrictions, and limitations over (the same always to be for the benefit of some one or more of such child or children) as the husband and wife, or the wife surviving should appoint, and for want of such appointment in trust for all and every the children of the marriage, equally to be divided amongst them, if more than one; and in case there should be but one child, then in trust for such only child, for his or their portion or portions, the shares of sons to be paid at 21, and the shares of daughters at 21 or marriage. This power was held by Sir L. Shadwell, V. C., not to be confined to a distribution, but to authorize an appointment of the fund to an only child, a daughter of the marriage; and that an appointment of the fund generally, as the daughter by deed or will should appoint, and in default of appointment, upon trust for the daughter's separate use for life, and after her decease to pay the principal to her executors or administrators as part of her personal estate, was valid; and this decree was affirmed by the House of Lords upon the motion of Lord Brougham, C.

22. In Cholmeley *v.* Paxton (*z*), it was decided at law, both in the Common Pleas and the King's Bench, that although a tenant for life be dispunishable of waste, and may cut down and sell the timber for his own benefit, yet under a common power of sale and exchange in the instrument under which he is entitled, a sale by the trustees of the power of the estate without the timber, and a sale by himself of the standing timber, is invalid as an execution

(*z*) 3 Bing. 207; 10 Barn. & Cress. 564, *nom.* Cockerell *v.* Cholmeley. An appeal to the House of Lords was withdrawn, in order to sustain the bill in equity. See 1 Russ. & Myl. 423, where it is stated by the Master of the Rolls by mistake that the writ of error was to the Exchequer Chamber.

of the power, and that a subsequent investment by the tenant for life of the timber money, in the name of the trustee of the settlement, did not cure the invalidity (*a*).

23. The parties entitled under the sale filed a bill to have their title made good, on the grounds, 1. That the sale was good in equity as to the estate itself. 2. That the remainder-man had sustained no injury, as he had the timber money. 3. That the original contract was a single one for the purchase of the whole, and that it was by mistake the contract was by the deed divided into two, and the purchaser was entitled to have that mistake rectified in equity. 4. Knowledge, acquiescence, and acts amounting to confirmation by the remainder-man. Lord Eldon dissolved an injunction obtained, for want of answer (*b*). This was after the decision of the point of law in the Common Pleas, and before the affirmance of that decision in the King's Bench on a writ of error. The cause came to a hearing before Sir John Leach, Master of the Rolls, and he dismissed the bill (*c*). He observed that a court of equity would, in favour of a purchaser, supply a defect in the execution of a power which consisted in the want of some circumstance required in the manner of execution; but here it was at law decided that there was no power in the trustees to sell the land without the growing timber, and there was no execution by the trustees of the power to sell the land with the growing timber, and he found no authority which applied to this case. He came to the conclusion that there was no mistake in the deed, and that there was no confirmation; for no man could be held by any act of his to confirm a title unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law; and here there was no proof that the defendant at the time of the acts referred to, was aware of the law upon the subject. From this decree there was an appeal to

(*a*) Cholmeley *v.* Paxton, 5 Bing. 48.
(*b*) Cockerell *v.* Cholmeley, 3 Russ. 565.
(*c*) 1 Russ. & Myl. 418.

the House of Lords (*d*), and the decree was affirmed upon the motion of Lord Brougham, C. This is a case of the first impression.

24. We may here introduce a decision (*e*), that where real estate is by a will converted into personalty, and an interest for life is given to one for life in the money, with in effect a general and absolute power of appointment, legacy duty will be payable by the appointees under the power, but still that the property is not so strictly the original legatee's as to render it liable to probate duty under her will.

(*d*) 6 Bligh, N. S. 120; 1 Cla. & Fin. 60.

(*e*) Drake *v.* Attorney-General, 10 Cla. & Fin. 257, affirming Platt *v.* Routh, 6 Mees. & Wels. 756; 3 Beav. 257.

SECTION II.

WHAT IS OR NOT A DUE EXECUTION OF A POWER.

1. *General power formerly not executed by a general devise: now* 1 *Vict. c.* 26.
2. *Roake* v. *Denne, where testatrix had a power over one moiety, and the fee in the other.*
3. *Observations on the case.*
4. *Burdett* v. *Spilsbury: where will under power was duly attested.*
5. *Now* 1 *Vict. c.* 26, *but the decision still important.*
6. *Smith* v. *Jersey, power of leasing with a clause of re-entry; a reasonable number of days may be allowed.*
7. *Observations on the case.*
8. *Nugent* v. *Cuthbert, accordingly.*
9. *Effect of exception in covenant to repair, of casualties by fire and war.*
10. *Rutland* v *Doe; last year's rent may be reserved before the day.*
11. *Observations on the case.*
12. *Saward* v. *M'Donnell: a will in execution of all powers confined by construction to some.*
13. *Affirmed in D. P.*
14. *Observations thereon.*

1. A GENERAL devise would not, under the old law, operate as an execution of even an unlimited power of appointment, unless the power or the estate were referred to, or the testator had no other real estate to satisfy the devise. This rule was followed in the case of Roake *v.* Denne, which

it would now be of little use to dwell upon, were it not that the doctrine may be applied to a power to appoint to limited objects (*a*), for now a general devise may operate of itself as an execution of a general power by force of the statute of Vict. c. 26, s. 27.

2. In the case referred to (*b*), an estate which had descended to two married daughters, as co-heiresses, was settled as to one moiety to the husband of Sarah, one of the daughters, for life, remainder to her for life, remainder to such sons as she should appoint by deed or will, and for want of such appointment to the children of the marriage, with remainders over, and the other moiety was settled on the other daughter and her husband and children. Ultimately Sarah, when a widow, purchased the fee of the last-mentioned moiety, so that she had the entirety, but one moiety in fee, and the other for life, with a general power of appointment: she had no other real estates. It was decided in the Common Pleas that a devise by her of all her freehold estates to one for life, on condition that out of the rents thereof he should keep such estate in proper and tenantable repair, with remainders over, passed the whole of the estate, that is, operated both as a devise of one moiety and an execution of the power as to the other. The Court relied upon the general intention, and upon the condition to keep the estate in repair. The Court of King's Bench reversed this decision, and that reversal was affirmed by the House of Lords upon the opinion of the Judges, and supported by Lord Lyndhurst, C., and Lord Tenterden, C. J., but opposed in some measure by Lord Wynford.

3. It has been observed (*c*), that in a case like Nowell *v.* Roake, just stated, the nature of the property might, without introducing any uncertainty into the general rule, be

(*a*) See 1 Sugd. Pow. 368, 369.

(*b*) Doe *v.* Roake, 2 Bing. 497; Denn *v.* Roake, 5 Barn. & Cress. 720; Roake *v.* Denn, 1 Dow, N. S. 437; 4 Bligh, N. S. 1; 6 Bing. 475.

(*c*) 1 Sugd. Pow. 402; and see p. 420.

considered to manifest a sufficient intention. I hold an estate as an entirety, but the tenure is in moieties, and one is subject only to my appointment; I give by my will all my estates to one for life. The rule would exclude that moiety within the power, if it stood there; but I direct that the tenant for life shall keep the estates in repair. The estate cannot be repaired by undivided moieties, although two tenants in common may repair the estate, and therefore the direction might, in favour of the intention, have been held, according to the decision of the Court of Common Pleas, as evidence that he was dealing with the entirety.

4. In Burdett *v.* Spilsbury (*d*), where a power to appoint by will was required to be signed, sealed, published, and declared in the presence of and attested by three or more witnesses; a will by the donee of the power, commencing with the words "I do publish and declare this to be my last will and testament," which were followed by a disposition under the power; and the will concluded with a declaration of that only being her last will and testament, "in witness whereof she had to that her last will and testament set her hand and seal," to which the word *witness* was added, under which the three witnesses signed their names, was deemed a valid execution of the power, for everything was rightly performed by the testatrix, and the general statement in the attestation affirmed that all had been done in the presence of the witnesses, which was stated in the body of the will. This was first so decided in the Court of King's Bench, but the decision of that Court was reversed in the Exchequer Chamber by four Judges against three. In the House of Lords seven Judges delivered their opinions in favour of the validity of the execution, and five against its validity. But the opinion of the majority was adopted by the House upon the advice of Lord Lyndhurst, C., Lord Brougham, and Lord Campbell.

5. This question also, as it arises upon a will made on or

(*d*) 10 Cla. & Fin. 340; 7 Scott, N. S. 66. Doe *v.* Burdett, 4 Adol. & Ell. 1; 9 Adol. & Ell. 936. See Bartholomew *v.* Harris, 15 Sim. 78.

after the 1st of January 1838, is set at rest by the 1 Vict. c. 26, s. 1, for where powers are exercised by will, the will must now be executed as the Act directs, and by the Act no form of attestation is required. The 54 Geo. 3, c. 168, also, as to past appointments, rendered them valid, although the word signed was omitted in the attestation, where by the old law it would have been required (*e*). But the principle of the decision in the House of Lords may apply to cases not within either of the statutes above mentioned. It was a decision in the right direction. When the general question as to attestations was first raised, the Judges, without any necessity and without any object, made refined distinctions upon this subject which did not reflect any credit upon the law as a science, and tended to encourage litigation, whilst it destroyed many executions of powers which might well have been supported without breaking in upon any rule of law, and unhappily Lord Eldon gave the weight of his great authority to these views, and rejected the application of the cases which had a powerful bearing upon the subject. I can compare the decisions to which I refer with none so aptly as with those on the original Annuity Act, and the latter should operate as a warning to all judicial authorities of the danger of losing sight of plain rules of construction whilst endeavouring to support a system. Many of them turned upon what were then termed nice distinctions, but they have since been looked upon in a very different light.

6. In Smith *v.* Jersey (*f*) it was decided that a qualified power of re-entry may be reserved in leases, under a power requiring *a* right of re-entry to be reserved. The estate was in strict settlement, and the power was to leave such parts of the estate as were then leased for life or lives, or for years determinable on lives, to any person in possession or reversion, for one, two, or three lives, or for any number of

(*e*) See 1 Sugd. Pow. 307, 312.

(*f*) 3 Bligh, 290; 2 Brod. & Bing. 473; 7 Price, 281; *nom.* Doe *v.* Smith, 5 Mau. & Selw. 467; 1 Brod. & Bing. 97.

years determinable on lives, at the ancient and accustomed yearly rents, duties, and services, or more, as there were, or at the time of demising the premises were reserved, *and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.* 2. And to lease any of the estates for 21 years in possession, at so much, or as great, beneficial yearly and other rents and services proportionably, as were then paid, or at the best rent, without a fine, and so as in every such lease there were contained a clause of re-entry, in case the rent should be unpaid 28 days. 3. And also to lease mines. Lord Vernon, the tenant for life, demised the property in question, which had been formerly let for years determinable on lives, for 99 years, if three lives should so long continue; and the power of re-entry was in case the rent and every or any of the duties services, reservations, and payments thereby reserved should be behind, *by the space of fifteen days,* &c. and no sufficient distress could be had upon the premises, whereby the same and all arrearages thereof might be fully levied and paid. And there was, at the end of the lease, a general clause that if any default should be made in payment, or performance of all or any of the reservations, covenants, or agreements before contained, it should be lawful for the lessor, his heirs or assigns, to re-enter (*g*). The rents, duties, reservations, and payments were the annual ones, and the usual form of leases, as well prior as subsequent to the settlement, was, with a conditional proviso for re-entry, similar to that in the lease. The Judges of the Court of King's Bench were of opinion that a discretion was left in the person exercising the power, and that he had well exercised the discretion reposed in him. They also held that other leases of the same premises were properly admitted in evidence, in order to prove that the usual form of leases was with a conditional proviso of entry, similar to

(*g*) See 1 Brod. & Bing. 218.

that in the lease in question; for the donee might with great propriety refer to the former leases, as a guide to his discretion, and the Court, in judging of the manner in which such discretion had been exercised, might as fitly look to the former leases. In the Exchequer Chamber this decision was reversed, upon the opinion of four judges against three. But upon a writ of error in the House of Lords, six Judges (including Richards, C. B., who, in the Exchequer Chamber, was of a contrary opinion) were of opinion that the lease was valid, and five were of opinion that it was invalid, and thereupon the judgment in the Exchequer Chamber was reversed, and the judgment in the King's Bench affirmed by the House of Lords, upon the advice of Lord Eldon, C., and Lord Redesdale. The learned Judges who delivered their opinions to the House differed as to the admissibility of the evidence of the former leases. Lord Eldon seems to have considered the leases valid on the general ground, but still he was of opinion that the existing leases, at the time the new lease was made, should be looked at, or it would be impossible to collect what the meaning of the power was. Lord Redesdale's opinion was that the power of re-entry in former leases should be inserted in the new, but that where no such power was reserved, then that a power such as would be a reasonable power should be inserted in the lease. If a power of re-entry was before reserved, the words were not necessary, because the rent was to be reserved in as beneficial a manner, and therefore if there was a power of re-entry in the former lease, that same power of re-entry, and no other, could be reserved. Therefore it was upon the particular words of the settlement, and not upon any general view of the case, that he conceived that the lease ought to be supported.

7. This decision, which, upon the general ground, appears to have been fully warranted by the words of the power, followed the general opinion and practice of conveyancers, to which Lord Eldon and Lord Redesdale thought great

attention should always be paid. It has been stated (*h*) that the result appears to be that Coxe *v.* Day, 13 East 118, is overruled, and that where the power is silent as to time and conditions, as in Doe *v.* Smith, a reasonable time and circumstances may be introduced into the clause of re-entry —as in that case 15 days, and no sufficient distress—or, as in a later case (Doe *v.* Rutland, 2 Mees & Wels. 661), 42 days—and that if the power expresses the time, although that prevents further time from being allowed, yet a reasonable qualification may be introduced into the clause of re-entry, *e. g.* a want of sufficient distress, as in Hotly *v.* Scott (*i*).

8. This decision was followed by a similar decision by the House, in the case of Nugent *v.* Cuthbert, already stated (*j*), where it was found by the special verdict that like clauses of re-entry for non-payment of rent were uniformly inserted by conveyancers in Ireland, in all leases, and were also uniformly used in leases by the Galway family, in devising the estates in question.

9. We have already seen that it was decided in the same case that, although a power prohibit a lease from being made dispunishable of waste, "by express words," an exception in the covenant to repair, of casualties by fire and war, is not a contravention of the power.

10. In Rutland *v.* Doe (*k*), the power of leasing, upon which the question arose, was given by a will, which devised the estate in strict settlement, and it required that upon every lease there should be reserved and made payable during the continuance thereof the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income, in respect of such lease. Under this power a lease was

(*h*) 1 Sugd. Pow. 437.

(*i*) Lofft, 316; 2 Brod. & Bing. 498, n. Doe *v.* Wilson, 5 Barn. & Ald. 363; 1 Sugd. Pow. 438; and see Rutland *v.* Wythe, 10 Cla. & Fin. 419.

(*j*) *Supra*, p. 475.

(*k*) 10 Cla. & Fin. 419.

made for 21 years, from the 11th October 1833, at a yearly rent, by equal half-yearly payments, on the 6th April and the 11th of October, in every year, except the last half-year's rent, which was thereby reserved, and agreed to be paid on the 1st of August next, before the determination of the said term. The Court of Exchequer decided in favour of the validity of the lease, on the ground that the reservation was a prudent one, and for the benefit of the lessor, and the rent might be made payable quarterly, half yearly, or yearly (*k*). This decision, however, was reversed by the Court of Exchequer Chamber, who, although they did not think that the last payment could properly be called a fine, yet considered that it caused a part of the term to be exempt from rent, and that rent could not be reserved beforehand (*l*). Upon a writ of error before the House of Lords, the Judges who were summoned were, six of them, of opinion in favour of the validity of the lease, and three of opinion that it was invalid. The Lords, upon the motion of Lord Lyndhurst, C., supported by Lord Brougham and Lord Campbell, held the lease to be valid, and accordingly reversed the judgment of the Exchequer Chamber, and affirmed the judgment of the Court of Exchequer. The Judges who supported the lease were of opinion that, where the donee of the power is not restrained by the express terms of it, there are no conditions to be added by implication, except such as are necessary to give effect to the conditions that are expressed. The discretion was reposed in the donee, as to the manner in which the yearly rent should be reserved; no fraud was suggested, and the reservation, by preserving the distress, was beneficial to the person entitled, whether the tenant-for-life or the remainderman. A yearly rent means a rent payable in each year of the tenancy, and payable in the year in respect of which it is reserved. The stipulation that the rent shall be payable

(*k*) Doe *v.* Rutland, 2 Mees. & Wels. 661.

(*l*) Rutland *v.* Doe, 5 Mees. & Wels. 688.

during the continuance of the lease, merely requires that the best improved yearly rent shall be reserved for every year of the term, for the whole period of it, and that it should be made payable in every year, during the continuance of the term, that is, neither before its commencement, which might make it a fine, nor after its termination, by which the security of distress for its payment at all might be lost. On the other side, it was considered that the reservation was no compliance with the terms of the power that the rent should be made payable during the continuance of the term. The restrictions were imposed for the benefit of the remainderman, and this restriction was intended for the very purpose of preventing the tenant for life from making any portion of the rent payable by anticipation. If the rent, for any given portion of the year, is made payable before the expiration of such portion of the year, there is nothing but a dry occupation by the lessee, without rent for the residue of such portion of the year, which is a direct breach of the power in favour of the tenant for life. Lord Lyndhurst, C., thought that the words of the power obviously imported nothing more than this, that in every year, as long as the lease should endure, a yearly rent should be reserved and made payable. It was clear that there had been no infringement of the restriction. The evident motive for fixing upon a day for payment before the last day of the term was to ensure the right of distress, for the benefit of the person, whoever he might be, that should at that period be entitled to the rent.

11. This decision could not fail of being acceptable to the Profession. It depended upon the principle which governed the decision of the House in the cases of Burdett *v.* Spilsbury, Smith *v.* Jersey, and Nugent *v.* Cuthbert. A mere literal performance of the conditions of a power may possibly not be a good execution of the power, because though a literal performance, it may in spirit and operation be an evasion of the power or a fraud upon it. But *primâ facie* a

literal compliance with the injunctions of the donor is all that can be properly required, and the Courts ought not to be anxious to add circumstances or provide for events concerning which he has been silent. If he have not thought it worth while to express his supposed intention, his power should be fairly construed as it stands. The disposition which it warrants may be improvident or unusual and without sufficient guards, but still it is the will of the donor. If an act is required to be done generally, *e. g.*, the reservation of a power of re-entry, it must be complied with by the donee, but whilst he acts with good faith, only reasonably and according to his discretion. It would have been much to be regretted if, in the case just considered, the *bonâ fide* reservation of the last half-year's rent before the day had been held to avoid the lease. Such a decision would have unnecessarily destroyed the title of *bonâ fide* lessees and purchasers in favour of an implied intent, whilst the donor might, if such had been his intention, have declared it in a few plain words. But still, the execution must be *bonâ fide*. A question was raised in this last case whether a reservation of the yearly rent at the beginning of the year would have been a compliance with the terms of the power, upon which the Judges differed (*m*), but this is altogether a different question: the actual reservation was a reasonable one, but the reservation suggested would be an unreasonable one. It would, no doubt, influence the tenant in the amount of rent which he would give; it would make him discontented and anticipate his means of cultivating and improving the land, and would have for its evident object the benefit of the tenant for life at the expense of the remainderman.

12. In the case of Saward *v.* M'Donnell, upon the supposed intention, a will professed to be in execution of all the powers of the testatrix was held to be an exercise of only two out of the three powers given to her by the two settlements referred to by her will. In pursuance of articles,

(*m*) See 10 Cla. & Fin. 427, 432. 446, 454, 469.

Rhoda, the wife's one undivided third part in certain estates, real and personal, was, by a settlement in May 1826, conveyed and assigned to trustees upon trust to convert and invest the produce in land or government or other securities, and to settle the lands to be purchased to such uses as the husband and wife should jointly appoint (which power was not exercised), and in default of such appointment then as to one-third part thereof as the wife should by deed or will appoint, and in default of and until appointment as to this one-third, and also as to the remaining two-thirds, to the husband until his insolvency, and then to the wife's separate use during his life, remainder to the wife for life, remainder to the children, as the husband and wife or the survivor should appoint, and in default of appointment, to the children in tail with cross-remainders in tail; and if all such children except one should die without issue, or there should be but one such child, to that child and his or her heirs and assigns for ever (I); and for default of such issue, if the wife should survive her husband, to her in fee, but if she should die in his lifetime, then to such uses as she by will should appoint, and in default of such appointment, to her right heirs. But for the purposes of transmission any leasehold property was not to vest before 21, and the trustees were to stand possessed of the trust monies invested in stocks, &c., and the stocks, &c., upon trusts to correspond with the uses, but for the purpose of transmission the same were not to vest in any child before 21. Rhoda, under the will of one of her sisters, became entitled to a moiety of another third of the property, and she and her husband, by a settlement in August 1826, settled that moiety to such uses as the hus-

(I) It was insisted by the answer of the sister of the testatrix, the heiress-at-law of the infant son, that the latter took the fee in the property. Part of the estates had been sold, but no new estate had been purchased. Whatever might be the true construction of the settlement, yet the personalty did not vest absolutely in the son, but became subject to the mother, Rhoda's, power of appointment.

band and wife should jointly appoint (which power was not exercised), and in default of such appointment to the husband for life, remainder to the wife for life, remainder to such uses as she by deed or will should appoint, and in default of such appointment to her right heirs. Rhoda, by her will, in execution of the powers under the two settlements, gave and appointed all that one-third part of her messuages, &c., in the county of Monmouth, and also all that one-third part of her personal estate and effects, unto a trustee, his heirs, &c., upon trust immediately after her decease, either by sale or mortgage of all or any part of the said one-third of her real and personal estate over which she had a disposing power, to raise and pay 500 *l.* to her husband to defray her debts incurred during her illness, funeral and testamentary expenses, and the residue for himself; and then as to the residue of the said one-third part of her said real and personal estate, and also as to the remaining two-third parts thereof, subject as after mentioned, she appointed, devised, ratified, and confirmed the same to her husband for life, and after his decease she gave and appointed the said messuages, lands, tenements, farms, hereditaments, premises, and real estate, and all her personal estate and effects, unto her infant son, his heirs and assigns for ever: provided that in case of the death of her son in her lifetime or before 21, without leaving issue, then as to the one-third part of the said messuages, &c., devised and bequeathed to the trustee in trust as aforesaid, and subject thereto, she directed the same, or so much thereof as might remain after raising the 500*l.*, to be sold and the money applied in payment of the annuity and legacies by her afterwards given, amongst which was a legacy of 2,500 *l.* to her husband. The first payment of the annuity was to be made on the first quarter-day after the decease of her infant son, and the annuity or legacies were to be paid as soon as the one-third part of her said real and personal estates could be sold and the monies accruing therefrom could be received, and the annuity and legacies

were to abate if the monies should be insufficient to pay them in full, equally in proportion. And as to the remaining two-third parts of her said real and personal estate, subject to her husband's life interest therein, she appointed and gave the same to her sister, her heirs, &c., for ever: provided that in case her son should survive her and attain 21, then after raising the 500*l.* she revoked the appointment of the residue of the said one-third part of her real and personal estate, and the annuity and legacies to be paid therefrom, and also the appointment and devise of the remaining two-third parts of her said estates to her sister, and confirmed the estates and interests firstly appointed to her husband for life, and after his decease to her son, his heirs, &c. The son died shortly after his mother's death, an infant of the age of four or five months. Lord Langdale, Master of the Rolls, in December 1838, decreed that the appointment of Rhoda's will extended over one-third part of the whole of the property included in the two settlements, and that the legacies and annuity became payable on the death of her infant son, and that the husband having elected to take under her will, was bound to confirm it, and the legacies were to carry interest from the end of one year from the testatrix's death. The Master of the Rolls, after stating the facts, said that the inclination of his mind was that an only child would take in tail. The testatrix meant to give one-third part of the whole of the settled property, and upon the whole of the will he thought that she intended to appoint and did appoint one-third of the property of the deed of May 1826, and of the property of the deed of August 1826, and intended the legacies to be raised on the death of her son. He held that a case of election did arise as to the husband, and that he had elected to take under the will. The annuity and legacies were declared to be charged on the said one-third (*n*). From this decree there was an appeal, and Lord Cottenham, C., in June 1839, varied the decree by declaring that the appoint-

(*n*) The judgment from a MS. note.

ment or will of Rhoda extended only over the one-third part of her property comprised in the settlement of May 1826, over which one-third she had a power of appointment expressly reserved to her by the settlement, and also over the whole of her property comprised in the settlement of August 1826, subject to the estate for life reserved to her husband by the last-mentioned settlement, and that the annuity and legacies were charged on one-third only of the property so appointed by the will or appointment, and by striking out so much of the decree as regarded the election of the husband, and also by directing that the interest on the legacies should be computed from the death of the infant.

13. From this last decree there was an appeal to the House of Lords, and it was insisted, in the reasons for the appellant, that Rhoda had power, under the deed of May 1826, to appoint immediately one-ninth of the real and personal estates in question, and a power to appoint by will [in default of children] two-ninths of the same estates, subject to the life interest therein to her husband; and under the deed of August 1826 she had, in the events which had happened, a power to appoint by will one-sixth of such real and personal estate, subject to the life estate of her husband, and she intended by her will to execute all such powers, and to deal with and appoint one moiety of such real and personal estate. That by the expression in the will, "all that one-third part," she meant one-third of the whole of the real and personal estate in which she had an interest under the two settlements of May 1826 and August 1826, and did not mean the one-third of the one-third of such real and personal estate which was comprised in the settlement of May 1826. And that where in her will she spoke of "the remaining two-third parts thereof" she must be referring to the entire residue after application of one-third of the estates real and personal over which she had any power of appointment, and could not be intending to speak of only that portion over which she had a

power of appointment under the second settlement. By the decree of the Lord Chancellor, Rhoda was in effect declared not to have exercised the power of appointment given to her over two-thirds of the property comprised in the settlement of May 1826, whereas from the language of her will an intention to appoint all over which she had a power of appointment was manifest. The putting the husband to his election was asserted to be right, as he took benefits under his wife's will, and she had by her will taken upon herself to deprive him of his life estate in a portion of the real and personal estates to which, under the deeds, he was entitled. The effect of the decree of the Lord Chancellor, it was said, was to charge the legacies only on 1-27th part of the entirety of the real and personal estate in which she had interests immediately, and on 1-18th of the same estates in reversion, subject to the life estate of the husband (I); and the effect of the decree of the Master of the Rolls was to charge the legacies on one-sixth part of the same estates immediately. The respondents maintained the decree on the ground that Rhoda, being a married woman, could only exercise her powers, and that according to the construction of her will she exercised such powers in favour of the legatees and annuitant to the extent of one-third only of what she could appoint, and in favour of her husband and her son, and in the event of her son's death under 21 without leaving issue, in favour of her sister to the extent of the remaining two-thirds. And it was insisted that her appointment

(I) This seems to be the operation of the Lord Chancellor's decree, although I am not sure that it was so understood; for when in the House of Lords the appellant's counsel contended that the legacies were charged upon one-third of the property comprised in each deed, that is, upon one-ninth of the whole estates in possession, and upon 1-18th in remainder, and not upon 1-27th, as the Lord Chancellor had decreed, his Lordship, I am told, seemed to assent to this view, as he complained of the appeal being needless. If this be correct, he must at the moment have considered his decree as establishing what was contended for; but that would still leave the two-thirds of the one-third unappointed according to the decree.

did not disturb or affect any estate theretofore vested in her husband, nor raise any case of election as against him, nor was any such question of election suggested by the bill. The appeal was dismissed, and the decree of the Lord Chancellor was, on the motion of Lord Brougham, affirmed with costs (*o*).

14. I am not aware upon what grounds the judgment of the Lords was founded. It seems to be correct as to the question of election (which indeed was given up at the bar), for there does not appear sufficient on the face of the will to raise a case of election against the husband, and also as to the time from which interest on the legacies was to run. But it appears to be open to considerable doubt in regard to the extent of the interest appointed by the will. The testatrix had an immediate power over one-third of one-third of the real and personal property, and (in the event which she provided for, of the death of her infant son,) she had, subject to her husband's life interest, a power of appointment over the remaining two-thirds of that one-third (I). She had, subject to her husband's life estate, a power of appointment over one-half of one other third of the real and personal property. She had two objects in view, one in all events to provide a sum to pay the expenses of her illness, and of her funeral, and the probate of her will. Subject to that small sum, which her first power would enable her to charge, she meant to give and to confirm to her husband a life estate in all her property, that is, in her moiety of the real and personal property, and then that it should go to her son. Both the husband and the son would have taken portions of the property, independently of her will, but that was immaterial in her view, as she intended to increase and not to diminish their interests. But she intended to provide for the death of her infant child,

(*o*) Printed Cases, D. P. 4 August 1848.

(I) See the note, *supra*.

and after providing in that event an annuity for her mother, and considerable legacies for her husband, and brother, and others, she intended her husband, and her sister after him, to take whatever was not required to answer the annuity and legacies. Now in the event provided for, she had full power (subject to her husband's life estate in parts) to dispose of the whole of her moiety as she thought proper. Her will was expressed to be in pursuance "of the powers and authorities in her vested" by the two deeds of May and August 1826, and of all other powers and authorities in her vested, or in anywise enabling her. She excepted none, and therefore meant to exercise all, and in the event for which she was providing, (viz. her infant's death,) she had just as full a power over the two-thirds of the one-third comprised in the settlement of May as she had in the one-half of the one-third comprised in the settlement of August. Her first disposition is, "of that one-third part of her messuages, farms, lands, hereditaments, and premises in the county of Monmouth, and also that one-third part of her personal estate and effects, whatsoever and wheresoever," to a trustee, who was immediately after her death, by sale or mortgage of all or any part "of the said one-third part of her real and personal estate," to raise the 500 *l.* This of course was not accurate, for the messuages, &c. were not hers; but speaking in a general sense, a moiety of them was. She might therefore properly be considered to mean that one-third of what she termed hers, that is of her moiety, was to pass. *All* the dispositions in her will, in every event, of this one-third, must be looked at in order to see what her intention was. The words require a full third of her property to satisfy them, and the trust which was to be exercised immediately pointed at an interest in possession. Now she had an immediate power over one-third of the one-third in the settlement of May: why therefore should not that pass by her appointment, in order to effect her expressed intention? That construction would leave the other two-thirds

of that one-third to pass under the other power in the same settlement with the other two-thirds of the interests in the settlement of August under the power in that settlement. And in no other way could the appointment of the remaining two-thirds of her property be satisfied. There was no difficulty in the way of this construction, unless the words were controlled by the context, which they were not; whereas there was considerable difficulty in confining the words to one-third of one-third of the one-third comprised in the settlement of May, and to one-third of the half of one-third comprised in the settlement of August. That portion could hardly answer the description of one-third of her messuages, &c. in the county of Monmouth, and of her personal estate and effects. The next disposition is of the residue of this "one-third of her real and personal estate," and of "also the remaining two third parts thereof," to her husband for life, and as she was aware of his rights under the settlements, she not only appoints and devises, but she ratifies and confirms the same to him. And the gift over, although it contains no such confirmation, yet shows an intention to give to her son all her property, which she describes no longer by her shares, but as *the said* messuages, lands, tenements, hereditaments, premises, and real estate, and *all* her personal estate." To stop here for a moment—she gives the two-thirds of that of which she had before given the one-third, that is, taken together, the entirety of what she had to give, and that she intended to do so is manifest from the gift over of the real property itself, and of *all* her personal estate to her son; she did not intend to give to him anything which she had not before given and confirmed to her husband for life: it is immaterial that the son, like the father, would take some of the property under the settlement of May; she meant to leave his title, as far as she had any power, in no doubt. And this construction would in no manner affect his interests. We now come to the dispositions to take effect in the event

which happened, of the child's death in his minority. In this event her powers were fully sufficient to enable her to dispose as she pleased of the whole of the moiety (I), subject to her husband's life estate in portions thereof. Her first disposition is "as to the one-third part of the said messuages, or tenements, farms, lands, hereditaments, and premises which she had devised and bequeathed to the trustee in trust as aforesaid, and *subject thereto*." So that she now devises over what she had thus previously devised: the further trust, as we have seen, was by sale to raise large sums by way of annuity and legacies: they were to be paid as soon as "the said one-third part of her said real and personal estates" could be sold. And as "to the remaining two third parts of her said real and personal estate (subject to her husband's life estate therein), she gave the same to her sister, her heirs, executors, administrators, and assigns for ever. Every part of the will appears to be consistent. In the event of her son's death it was sufficiently clear that she intended one-third of her real and personal estates to be sold. Now her real and personal estates consisted of a moiety of certain real and personal estate: what she had not thus disposed of she intended her sister to take: it was within her powers, and she expressly exercised them all:—her sister was to take the remaining two third parts of her real and personal estates. These dispositions might not on the whole frame of the will be deemed sufficient to raise a case of election, but they seem to be sufficient to pass the two-thirds of the one-third comprised in the settlement of May. The whole must pass if the sister was to take two-thirds of the property, for she could not be held to take two-thirds of the one-third without at the same time holding that the remaining one-third of that one-third was charged with the annuity and legacies. The true construction seems to be, that the whole of the one-third of the one-

(I) See the note, *supra*.

third in the settlement of May, that is one-ninth or 2–18ths, and one-third of the one-sixth in the settlement of August, that is 1–18th, or altogether 3–18ths, were made subject to the annuity and legacies, and that the remaining two-ninths of the one-third in the settlement of May, that is 4–18ths, and two-thirds of the one-sixth in the settlement of August, that is 2–18ths, or altogether 6–18ths, passed (subject to the husband's life estate), to the sister. It would be found difficult to satisfy the devise of the two-thirds by confining it to the remaining two-thirds of the property in the settlement of August. The decree of the Lords seems to have defeated the testatrix's intention, and to have made 1–27th only in possession subject to the legacy and annuities, and to have left the two-thirds of the one-third comprised in the settlement of May to descend to the testatrix's heir.

SECTION III.

OF VOID EXECUTIONS.

1. *Lease for a longer time than power warrants, void for excess.*
2. *Conolly* v. *M'Dermott: father under a power to appoint to children cannot bargain for himself.*
3. *Jackson* v. *Jackson: the like.*
4. *Right of executor to indemnity against covenants in invalid leases before he parts with residue.*
5. *Receipt of rent by remainderman does not bind him by a covenant in a void lease.*
6. *Acquiescence may bind parties.*

1. In the case of the Queensberry leases, Lord Eldon, C., observed in the House of Lords that there was a rule in Westminster Hall, that if a man has a power to grant for 10 years, and he grants for 21, the lease, although bad for the 21, will be good for the 10, because then both parties have before them a written instrument which gives the power,

and they both know what is the utmost extent for which it is good (*a*).

2. A parent having a power of appointment cannot, under colour of an appointment, make a bargain for himself, even where he adds some interest of his own. In Conolly *v.* M'Dermott (*b*), by a settlement in 1769, estates were settled on William Kelly for life, and after his decease to the use of all and every his child and children who should be living at his decease, for such estate and estates, and in such shares and proportions, and subject to such provisals, limitations, and agreements as he by deed or will should appoint, and for want of appoinment, to the use of all and every his child and children who should be living at his decease, their respective heirs and assigns, as tenants in common, with certain limitations over if William died without issue of his body living at his decease. William Kelly had two daughters, Honora and Helena. Upon the marriage of Honora, whilst Helena was very young, by a settlement in 1791, William Kelly, after reciting that in consideration of the intended marriage, he had agreed to appoint the settled estates to the uses after mentioned, and also to convey to the uses an estate to which he was himself entitled, (but not containing any recital as to the payment of his debts,) appointed and conveyed the several estates to the use that he might receive a yearly rent of 350*l.*, until the several debts then due by him, and mentioned in a schedule, and all interests and costs should be paid off, and the residue of the rents until the debts were paid off were to be paid in satisfaction of costs, and of the interest and principal of the debts, and after they should be paid off William Kelly and the intended husband to receive the rents equally during the life of William Kelly; and if William Kelly's wife should survive him, she was to receive a rent of 150*l.* per annum for her life, and after William Kelly's death, the estates were

(*a*) 1 Bligh, 437, *qu.* the reason.

(*b*) Beat. 601; Printed Cases, D. P. 1824. I was of counsel for the respondent. Judgment, 4 May 1825.

settled, (subject to the 150*l.* per annum and the remaining debts and interest) to trustees for 200 years to secure the rentcharge, and also a portion of 2,000*l.* for the daughter, Helena, remainder to the intended husband and wife, and the issue of the marriage, in strict settlement, with remainder to Helena for life, remainder to her sons and daughters in strict settlement, with the ultimate remainder to William Kelly in fee. Lord Manners, C., held, that as the father, William Kelly, gave up part of his life estate, and brought into settlement, exclusive of what was the subject of the power, very considerable property, the appointment was valid, although he made a provision for the payment of his debts and the other provisions before stated, and he, of course, held that the settlement in other respects operated as an appointment to the daughter, and a settlement with her concurrence. But, upon an appeal to the House of Lords, this decree was reversed, with very special declarations. It was declared that the deed of 1791 could not operate as an appointment by virtue of the powers vested in William Kelly by the deed of 1769, inasmuch as the same was not made in conformity to the powers, and was, in effect, a bargain made by William Kelly with the intended husband for his own benefit, and for the benefit of his wife, to the prejudice of his daughters, Honora and Helena, and to the contingent rights which they respectively would have had in case of the death of either of them in the lifetime of William Kelly, leaving the other surviving him, and to the contingent rights which were, by the deed of 1769, limited to either, in case William Kelly had died without leaving issue of his body living at his decease (and which I have not thought it necessary to state); and it was declared that the deed of 1791 ought to be deemed fraudulent and void against Helena, unless she had thought fit to elect to take the provision made for her by that deed out of both estates, and therefore the order proceeded to reverse the decree, and finally declared that Helena was entitled to have the deed of

1791 set aside as an undue execution of the powers in the deed of 1769, and fraudulent and void against her, and to be let into possession of a moiety of the estates in the settlement of 1769 in fee, or as absolute owner, and to have an account of the rents since the death of William Kelly, but the husband of Honora to have a fair allowance for his expenditure, since the death of Kelly, in new erections and buildings, and in draining, reclaiming, enclosing, ditching, walling-in, fencing, and otherwise substantially and permanently improving the lands, swamps, bogs, &c., and in converting the same into arable or pasture. And with these declarations the cause was remitted to the Court of Chancery.

3. In a later case of the same nature (*c*), in which, under a power to appoint to children, the father, who was tenant for life, appointed to his eldest son, by an instrument dated in January 1804, in which month the son had previously attained 21, and the deed was free from all objection on the face of it, but the father and the son, four days afterwards, joined in granting a lease for lives of part of the estate, in consideration of a large fine, which was to be applied in discharging debts on the estate; and by a deed of December 1807 (in which it was stated that the estate had been conveyed to the son, it being found convenient for the purpose of family settlements, and to enable them to perform agreements for leases, and for enabling the father to pay off several debts and engagements of the son, and the father reposing the fullest confidence in the son), the son, in consideration of the debts by his father paid, and in discharge of the trust and confidence reposed in him by his father, conveyed the lands to his father in fee. The father disposed of the estate by his will, and Lord Plunket, C., established the will; being of opinion that the appointment was valid. Upon an appeal to the House of Lords, Lord Cottenham, C., thought it doubtful whether the father's title could be maintained, but considered the case not ripe for decision: the

(*c*) Jackson *v.* Jackson, 7 Cla. & Fin. 977; West, 575.

decree therefore was reversed, and the Master was directed to inquire into the title of the father and the validity of the appointment, and the cause was for that purpose remitted to the Court of Chancery in Ireland. The Master reported that judgments (I) to the amount of 2,404 *l.* had been obtained against the father before the appointment, and that they were incumbrances on his life estate, and were all satisfied on the 5th May 1804: he was unable to report how the fine was applied, no evidence thereof having been laid before him save so far as the statements in the deeds and the facts in relation to the judgments might be deemed evidence thereof, and he found that the appointment was a good and valid one in law. The Chancellor, Sir E. Sugden, set aside the appointment and conveyance as fraudulent and void, and was of opinion that the father's will, although in favour of his two surviving sons, could not be deemed a valid execution of the power. He considered the case as the common one of a power of appointment vested in a father, and a stipulation made by him for his own benefit in the exercise of it, which the Court had always considered as a fraud upon the power. The fraud consisted not in the selection by the father of one child

(I) We may here refer to a few cases relating to judgments. It has been decided in the Lords previously to the late Acts, that a judgment creditor is entitled to the benefit of an annuity reserved out of his estates in a conveyance by the debtor of all his estates for the benefit of creditors; Lord Dillon *v.* Plasket, 1 Dow, N. S. 320; 2 Bligh, N. S. 239. The executors of the conusee of a judgment may acquire a new right by a judgment of revivor recovered by themselves; Farrar *v.* Beresford, 10 Cla. & Fin. 319; see Franks *v.* Mason, 9 Ir. Eq. Rep. 358, for the *scire facias* is not simply a continuance, but creates a new right; Farrell *v.* Gleeson, 11 Cla. & Fin. 702. An assignee of a judgment under the Irish statute, 9 Geo. 2, c. 5, is bound by payments made by the conusor of the judgment to the conusee subsequently to the registry of the assignment, where such payments are made without notice; Boyle *v.* Farrell, 12 Cla. & Fin. 740. An award between the conusor and an assignee of the judgment cannot be impeached by the conusor on questions decided by the arbitrator where the assignee files a bill for an account on the foot of the award; Sir George Hill *v.* Ball, 2 Bligh, N. S. 1.

in preference to another, but in the arrangement which made the appointment, though in form to the child, in effect an appointment to the father himself. To make such an appointment fraudulent it was not necessary that it should be wholly for the benefit of the father, it was enough that it was partially so, and if it were either wholly or partially in the father's favour, if any benefit were derived to the father himself through the instrumentality of that power of appointment, the Court held that though in legal form it was exercised in favour of the son, it was a fraudulent and void disposition (*d*).

4. Where a tenant for life had granted leases under a power, most of which were not in conformity with the power, and he had covenanted with the lessees for quiet enjoyment, and some of them had paid fines, and others had laid out considerable sums in improvements, and the tenant for life made the next tenant for life in remainder his residuary legatee, it was held in the Lords, upon the advice of Lord Eldon (reversing a decree of the Master of the Rolls), that before the residue of the personal estate should be paid to the legatee he ought either to confirm, or procure to be confirmed, the leases, or otherwise give a satisfactory indemnity to the executor against any claims in respect of the leases, and all costs, &c. which he might be subjected to in respect thereof (*e*).

5. Receipt of rent by a remainder-man does not bind him to perform a covenant for renewal in an invalid lease granted under a power by a previous tenant for life (*f*).

6. But persons may bind themselves by acquiescence, so as to prevent them from impeaching an invalid lease. In Lord Selsey *v.* Rhoades (*g*), under a will, James Lord Selsey

(*d*) Jackson *v.* Jackson, Dru. 91. See Hamilton *v.* Kirwan, 2 Jo. & Lat. 393.

(*e*) Vernon *v.* Lord Egmont, 1 Bligh, N. S. 554. See Marshall *v.* Holloway, 5 Sim. 196.

(*f*) Higgins *v.* Lord Rosse, 3 Bligh, 112.

(*g*) 2 Sim. & Stu. 41; 3 Bligh, 1. See 1 Cla. & Fin. 56.

was tenant for life, with remainder to John, his son, for life, remainder to John's son absolutely, and the tenants for life had respectively a power of leasing. In 1804 James Lord Selsey and his son John agreed to grant a lease to their agent for 21 years from 1806. In 1806 James Lord Selsey, John his son, and James his grandson, resettled the estate, and subject to certain powers of appointment, James Lord Selsey became again tenant for life, remainder to John for life, with remainders over, under which Henry John Lord Selsey became tenant for life (I). James Lord Selsey died in 1808. In 1809 John Lord Selsey granted a lease pursuant to the agreement; he died in 1816 without having disturbed the lessee, and Henry John Lord Selsey succeeded to the estate and acquiesced in the lease until 1821, when he and the personal representatives of James and John Lords Selsey filed a bill to impeach the lease, on the ground of the lessee having taken advantage of his situation as agent, and obtained the lease by misrepresentation and upon a false valuation of the land. Sir John Leach, V. C., thought that the case was not made out, and dismissed the bill with costs. Upon an appeal to the House of Lords, Lord Eldon, C., observed that if the suit had been instituted recently after the contract, and there had been no acts of confirmation, probably the lease might not have stood, but James Lord Selsey and John Lord Selsey acquiesced so long, being well acquainted with the facts, that it was difficult to say that they could have impeached the lease, and the appellant, Henry Lord Selsey, could not do that which they could not have done. The appeal was dismissed without costs.

(I) This is what I collect from the Printed Cases.

SECTION IV.

OF PRIORITY OF CHARGE UNDER AN APPOINTMENT, AND OF DESTRUCTION OF POWERS.

1. *Priority of charge under power over jointure.*
2. *Long* v. *Rankin: power of leasing not destroyed by transfer of life estate as a security; the transfer reserving the right to lease with consent.*
3. *Observations on the case.*

1. By a marriage settlement a leasehold estate was settled on the intended husband for life, then to secure 100 *l.* a year jointure to the intended wife for her life, and subject thereto to the use of the heirs male of the body of the wife by her husband, and for want of issue to be begotten between them, to the use of the husband, his heirs, and assigns for ever [and in the event of the settled lands proving insufficient, the jointure was secured on other property (*a*)]; and it was declared that the husband should be at liberty to raise by deed, mortgage, or by any other writing, 1,000 *l.* to be applied to any purposes he pleased, but that the said sum of 1,000 *l.* was not to be raised by way of the sale of the lands. The husband transferred his life interest, and assigned and appointed the 1,000 *l.* which he had power to raise, to a person by way of mortgage, to secure 1,500 *l.* and interest. Upon a contest between the mortgagee and a son of the marriage, after the death of his father, it was insisted that the mortgagee was at all events entitled to 1,000 *l.* as a charge upon the estate; on the other hand, it was contended that it could only be raised out of rents and profits. Lord Plunket, C., directed inquiries as to the annual value of the property and the value of the life interest, but this order was reversed in the

(*a*) 3 Dru. & War. 456.

House of Lords as immaterial, and the case sent back to the Court of Chancery in Ireland with a declaration that the mortgagee became entitled to the benefit of the charge. It was contended for the jointress, that she was entitled in priority to any payment to be made under the charge of the 1,000 *l.* Lord Cottenham, C., expressed his opinion that this was not intended to be a restricted power: it was a power in addition to the value of the life estate, and, although it was unusual to do so, he would say that he did not feel any doubt that the 1,000 *l.* when raised was to be a charge upon the estate from the period when it was raised, the interest to be paid by the tenant for life, and the person who lent the money to be the first person who had a charge upon the estate after the expiration of the tenancy for life. He did not know very well how the question with regard to the jointure could be declared, at the same time he had not much doubt upon it (*b*). Upon the case coming on again in Ireland, Sir E. Sugden, C., said that there seemed to have been a great deal of litigation about nothing. It was said that the power only extended to charge the life estate, but it was absurd to suppose that the intention was to give a man the power of charging merely his own life estate. The settlement clearly authorized a charge of 1,000 *l.* upon the term, and in his opinion authorized the creation of that charge with interest, although upon the subject of interest the settlement was silent, and he decreed accordingly. No claim was set up by the jointress for priority (*c*).

2. In Long *v.* Rankin (*d*), it was decided that a conveyance of his life estate absolutely to secure an annuity by a tenant for life with a power of leasing in possession, did not prevent him from exercising his power. The persons to whom the life estate was conveyed covenanted that if the

(*b*) Simpson *v.* O'Sullivan, 7 Cla. & Fin. 550.

(*c*) 3 Dru. & War. 446. There was an appeal to the House of Lords from this decree (M'Swiney *v.* O'Sullivan), which dropped for want of prosecution.

(*d*) 2 Sugd. Pow. App. 513.

present lease of the premises should expire during the life of the tenant for life, it should be lawful for him to let the same to such persons, and for such term, as he should think proper, with their consent, provided a yearly rent were reserved not less than the present yearly rent. The tenant for life subsequently made a lease with such consent as was required by the above deed, and that lease was conformable to the power. The power was held to be well executed by the Court of King's Bench in Ireland, and their decision was unanimously affirmed by the Court of Exchequer Chamber there, and that decision was affirmed in the House of Lords, with 150 *l.* costs (*e*). The opinion of the Judges was delivered by Lord Chief Justice Abbott (I), but Lord Eldon, C., in moving the affirmance of the judgment, observed that he was a little anxious to say that he desired it might not be understood that he had given any opinion with respect to the decision of the case of Ren *v.* Bulkeley, Doug. 292.

3. It has been observed that as the words of the power in Long *v.* Rankin were the usual ones, this would seem to make the decision depend, as far as Lord Eldon was concerned in it, on the right reserved to execute the power; it was not considered that any intention of the donor was contravened by that decision. Long and Rankin, without founding itself on Ren *v.* Bulkeley, and even professing not to confirm it, decided that the transfer of the whole life estate, if by way of security, did not destroy the power where the right to exercise it against the incumbrancer was reserved by the deed.

The opinion of the Judges appears to have been founded upon the following grounds: 1. That the life estate was not destroyed but transferred. 2. That as between the tenant for life and the annuitants (the persons to whom the life

(*e*) 1 Sugd. Pow. 58, 71.

(I) The reasons for the appellant were signed by Sir Samuel Romilly and Mr. Abbott, and insisted that the transfer of the estate destroyed or suspended the power.

estate was transferred), he was still authorized to exercise the power. 3. That the lease operated by estoppel during the life of the tenant for life, and the annuitants would in equity have been restrained from disturbing the lease. 4. That leases for years are not derived out of the estate of the lessor. 5. That it is immaterial to the remainder-man whether or not it is so annexed: his security depends upon the conditions and qualifications under which the power is to be executed. 6. That the language of this power showed that the donor did not intend to annex the power to the estate. 7. That the lessee is a purchaser, and his estate is not to be taken from him unless it be for some good reason founded in justice, or in the plain intention and expressions of the original settlor of the estate. It will readily be observed that the 7th ground is common to every case, and affords no specialty; and that the 1st, 2d, and 3d grounds do not affect the real question, which is, does the lease bind the remainder-man? The 6th ground, as far as it puts the case upon the intention of the donor, prevents it from being an authority of general application. But independently of principle, it would be difficult to maintain the decision upon this ground, for the donor's intention was that the power should not be exercised *before* the tenants for life acquired the estate, from which an intention might be collected that they were not to exercise the power *after* they had lost the estate. The words are, when and as they shall be in the actual possession, and the leases are to commence in possession. Does not this mean a continuing possession? Suppose a transfer of the life estate while it was a remainder, not in possession, so that the tenant for life never could come into possession, could he, nevertheless, exercise the power? If not, how does it differ the case that the tenant for life acquires the possession, but afterwards parts with it? As far, therefore, as depends upon the expressions of the donor, the lease does not appear to have been authorized by the power. The 4th

and 5th grounds are the only ones which bear upon the main point, as far as it depends upon principle. The 4th is far from conclusive. Whether the lease operates upon the life estate, or is derived out of it during its continuance, is immaterial. The distinction is merely critical in one sense. The estate is given to the donee for life, and he is the only person who can charge that estate with the lease. The power might have been given to a third person taking no estate, but it was not. The donor, therefore, contemplated that the donee could not charge the remainder-man without charging his own life estate. This brings us to the 5th ground, that it is immaterial to the remainder-man whether or not the power is annexed to the estate. But is that so? If the power is given to a third person, the donor has selected him as one in whom he places confidence, and who has no interest to favour either the tenant for life or the remainder-man at the expense of the other. The security of the remainder-man, it is said, depends upon the conditions and qualifications under which the power is to be executed. No doubt it does; but much also depends upon the choice of the tenant and the *bona fides* of the transaction. A lease may be perfectly legal under the power, and yet not such a contract as would have been entered into by a provident tenant for life, binding his own estate as well as that of the remainder-man. It may, therefore, be of deep importance to a remainder-man that the tenant for life, after he has involved himself with annuity transactions and transferred his life estate to secure them, should not be at liberty to exercise the power of leasing under the direction of the annuitants when it has become a matter of little interest to himself upon what terms a lease is granted. If the donor were asked, Do you mean the tenant for life to exercise his power after he has parted with his life estate? he would no doubt answer, No. It is much easier for a tenant for life to grant an invalid lease than it is for the remainder-man to set it aside. The decision

of the Lords would, of course, apply as well to a sale out and out as to a conveyance by way of mortgage or to secure annuities; and yet this consequence was not adverted to, although, in delivering the opinion of the Judges, the Chief Justice observed, that it was not necessary to say in that case that a leasing power may not, by the terms in which it is given, be so inseparably annexed to the estate of the tenant for life as to become void and inoperative if he parts with his estate and transfers it to another. This, he added, *probably* may be so by the terms in which the power is given, because he who gives it may give it with what qualifications he pleases. It is to be regretted that this point was treated as in any manner doubtful, for it admits of no doubt. The donor may, if he please, give the power to the tenant for life, exercisable only whilst the estate for life is actually vested in him; and the real question in Long *v.* Rankin was, whether that was not implied from the nature of the power in that case: a sale of the life estate out and out would have destroyed the power (*f*).

(*f*) These reasons are in 1 Sugd. Pow. 71.

CHAPTER IV.

OF LEASES.

WE have already had occasion to consider many cases on leases under the heads of Contract (*a*), Settlement (*b*), and Powers (*c*), but there still remain for our consideration cases which relate only to leases, or to leases not under powers.

SECTION I.

OF AGREEMENTS.

1. *Parol agreement for lease for lives and lives not named at the time.*
2. *Nomination of lives in lessee, but they must have been existing at the time.*
3. *Written agreement for lease for lives and lives not named: nomination in lessee.*
4. *Moore* v. *Blake: lease part of the consideration of sale: delay.*

1. WHERE a parol agreement was made for a lease for three lives, but nothing was said as to by whom the lives were to be named, and the tenant not having laid out any money in substantial improvements, about four or five years after the agreement (the acreage rent having been in the meantime reduced by the landlord, and the latter having given to another tenant a few acres of the land about or shortly after the time the lives were named) named three lives, one being a child born since the agreement, for whom on his death another child's life was substituted, and some evidence was given of the landlord's approbation of the lives,

(*a*) *Supra*, p. 63, 72.
(*b*) *Supra*, p. 159.
(*c*) *Supra*, p. 464, 465, 475, 479, 481, 483, 496, 499.

and the tenant filed a bill for a specific performance of the original agreement, in his answer to which the landlord denied any positive agreement for anything beyond a tenancy at will, and also denied that any lasting or valuable improvements had been made upon the land:—Lord Clare, C., decreed a specific performance for the three lives at the reduced rent, which Lord Redesdale, C., reversed, but he directed an inquiry as to substantial improvements by the tenant subsequently to the original agreement. The Master reported that the tenant had not made any such improvements, and Lord Chancellor Ponsonby dismissed the bill without costs, and upon an appeal to the House of Lords, the last decree was, upon the advice of Lord Eldon, C., and Lord Redesdale, affirmed (*e*). Lord Eldon expressed an opinion that the lives under the agreement ought to have been lives named and existing at the time. If the tenant was to name the lives, he must name three lives that were in existence at the time the agreement was made. He asked during the argument, if an agreement were for a lease for three lives, what was the rule by which the Court was to say that one party should name the lives and not the other (*f*). How, he asked the counsel, would they argue in the Court of Chancery in the case of an agreement for three lives not specified nor settled by whom to be specified? Would the Court name the lives? Could the Court execute, unless it were alleged in the bill that they had agreed as to the names? He thought that the bill ought to have been dismissed in the first instance. Lord Redesdale concurred in this view. The bill was for the performance of the original agreement, the decree of Lord Clare executed an agreement several years later.

2. In a case before Lord Plunket, C. (*g*), in which he established an agreement for a lease for three lives, although

(*e*) Wheeler *v.* D'Esterre, 2 Dow, 359.

(*f*) See Pritchard *v.* Ovey, 1 Jac. & Walk. 396; Fitzgerald *v.* Vicars, 2 Dru. & Wal. 298.

(*g*) Fitzgerald *v.* Vicars, 2 Dru. & Wal. 298.

no lives were named in the agreement, and held that the right to nominate the lives was in the lessee, but that lives *in esse* at the date of the agreement must be named, following the case of Kensington *v.* Philips, which will next be stated, and Pritchard *v.* Ovey (*h*), he observed with reference to Lord Eldon's observation during the argument of Wheeler *v.* D'Esterre (which he said was very imperfectly reported), as to the invalidity of an agreement where the lives were not named in it nor settled by whom to be specified, that he could not consider this opinion, thrown out in the way it was, as a decision of the Court on the point interrogated to, or as an authoritative declaration of Lord Eldon's own ultimate opinion upon it. For the meaning of Lord Eldon, and for the opinion of the House of Lords in that case, he must refer to the facts which existed in it, and those were, first, that one of the lives named was not in existence at the time of the agreement; secondly, that the bill prayed the performance of an agreement made in 1782, and the decree below was for the performance of a different agreement; and thirdly, that the prayer of the bill was that the leases prepared by the defendant's brother should be perfected, but in those leases blanks had been left for the quantity of lands and for the lives.

3. In a later case before referred to (*i*), a written agreement was made for a lease for three lives (not named) at the yearly rent of 140 *l.*, to the tenant in possession, under a lease which had then expired or was about to expire. The owner sold the estate subject to the agreement, and after the tenant had continued eight years in possession under the agreement, paid the rent and made some improvements, the purchaser refused to perform the agreement. The tenant named three of his children as the lives, and filed a bill for a specific performance; there was some evidence of the understanding of the parties to the agreement that the lease

(*h*) 1 Jac. & Walk. 396. 5 Dow, 61. See Pritchard *v.* Ovey, 1 Jac. & Walk. 396.

(*i*) Lord Kensington *v.* Phillips,

should be for the lives of three of the tenant's children. A specific performance was decreed, and upon an appeal to the House of Lords, the decree was affirmed with 100 *l.* costs. For the tenant it was insisted that he was the person to name the lives, and that the landlord should have applied to him to name them. For the landlord it was said that the tenant might perhaps have the right to name the lives, but his neglect for so long a period was a bar to a specific performance. Lord Eldon observed that the purchase was made subject to the agreement. The person who was concerned for the purchaser knew that there was such an agreement, and he thought the law would justify him in saying that the tenant being in possession, the purchaser was bound to know the nature of his title and the demand to which he was subject. Here, however, it was in fact known, as the estate was purchased subject to the agreement, and the equity of the case therefore was that the agreement should have been made good at the time of the purchase, and though an objection was made that the naming the lives then rendered the performance a different thing (which was the case) from what it would have been if the lives had been originally named, as the lives if named at first might have dropped by that time, yet it was clear that the parties were going on as if the one had been entitled to performance and the other had been bound to perform, so that there seemed to have been a mutual default. He was anxious that this should not be considered as a decision that under such an agreement as this a party might lie by as long as he pleased, and then apply with effect for a specific performance (*k*).

4. In Moore *v.* Blake (*l*), Moore sold and assigned to D'Arcy a leasehold estate, in consideration of D'Arcy's paying some debts due by Moore and advancing him 200 *l.* on his bond and a judgment, and also in consideration of a lease which, by a written agreement, D'Arcy agreed to execute to Moore of part of the estate, subject to the pay-

(*k*) See 1 Jac. & Walk. 403. (*l*) 4 Dow, 230.

ment of the 200 *l.* Moore continued in possession of the portion agreed to be leased to him. D'Arcy sold to Blake his interest in the estate and in the 200 *l.* and other sums subsequently advanced by him to Moore and secured by judgments, upon which judgments writs of *fi. fa.* were issued by Blake, and Moore's interest sold to a brother of Blake's, and Moore was turned out of possession: a bill was filed against Blake, who was the real purchaser, for a specific performance, and there was a long delay in prosecuting the suit. Lord Chancellor Ponsonby decreed a specific performance. Lord Manners, C., upon a rehearing, dismissed the bill upon the ground of the delay in prosecuting the suit (*m*), but upon an appeal to the House of Lords his decree was reversed, and the first decree in substance affirmed, upon the advice of Lord Eldon, C., and of Lord Redesdale. The latter observed that this was not simply a contract for lease, but that the execution of the lease was part of the consideration of the sale of the whole interest, and that D'Arcy could not refuse performance and yet retain the property. The ground of delay, then, did not apply to this, as it was not a mere contract of lease between landlord and tenant, but a part of the transaction which gave D'Arcy the character of landlord. The sale of the equitable right under the writs of *fi. fa.* was treated as invalid.

(*m*) 1 Ball & Beat. 62.

SECTION II.

OF LEASES.

1. *Lease by administrator: covenant to renew under a penalty, is a penalty and may be paid.*
2. *New lease for lives by tenant for life set aside for misrepresentation, &c.*
3. *Lessee for lives cannot avow under statute without reversion.*
4. *Lease to agent for inadequate consideration whilst lessor in distress.*
5. *Rhodes* v. *de Beauvoir: issue to try fraud against the lessor by lessee, and the solicitor, of both.*
6. *Lease for lives renewable for ever of charity land, when valid.*
7. *Whether the trustees of charity lands may sell them.*
8. *Where reservation of trees does not include trees subsequently planted and registered.*
9. *Bog will pass if within the ambit of the boundaries of the parcels.*
10. *Statute for apportioning rents applies to Scotland.*

1. An administratrix of her late husband who with her children was entitled beneficially to a church lease, granted a lease of the lands at a rent for a fine of 70 *l.*, and she covenanted, as long as she held the head lease and obtained a renewal, to renew under a penalty of 70 *l.* She claimed to pay the 70 *l.* as a penalty instead of renewing. The Court of Exchequer in Ireland dismissed a bill filed against her for a specific performance. Upon an appeal the House of Lords affirmed the decree. Lord Eldon, C., was clear that this was a case where the rule that the penalty was not to be considered as of the essence of the contract did not apply; the option was meant as an alternative; it was of the essence of the contract, and the only way to make it reasonable, otherwise the contract would have been bad, *though she had been the absolute owner* (*a*); but she was administratrix, and she could not bind the interests of her children by a lease so very improvident. Lord Redesdale said also

(*a*, See Willan v. Willan, 2 Dow, 275; *supra*, Contracts, pl. 6.

that this sublease would have been bad though the lady had had the absolute interest in the lease; but she had not that absolute interest. In both views it was bad unless combined with the option of paying the penalty. How far she could bind her children even as to the payment of the penalty he would not say at that time (*b*).

2. Where a tenant for life (I), under a will of an estate held by a tenant under a lease for three lives, at a rent of 300*l*., while still under age renewed the lease by substituting two young lives for two old ones, at the same rent, which was not half the value; and the consideration was the promise to pay a year's rent then due (but for which, nevertheless, a bill was given), and a promise to plant 10,000 trees, and to make over to the lessor those already planted; and it afterwards appeared that none had before been planted, and the new lease contained no covenant to plant, but only a mere endorsement on the lease, and, in fact, no new trees were planted, (which neglect was attributed by the lessee to his having been deceived by the lessor in representing that he was of age, and had power to grant the lease,) and the old lease was not delivered up, but the lessor, after he attained 21, had given several receipts for rent as such:—Lord Manners, C., upon a bill filed to set aside the lease, dismissed the bill with costs. Upon an appeal, the House of Lords, upon the motion of Lord Eldon, C., who said he had the concurrence of Lord Redesdale, reversed the decree, and declared that the lease was one which ought, as between the lessor and lessee and those claiming under the lessee as volunteers, to be delivered up to be cancelled; but there being a question as to the claims of the wife of the lessee, as a purchaser under her marriage

(*b*) Magrane *v.* Archbold, 1 Dow, 107. See Hackett *v.* M'Namara, Llo. & Goo. t. Plunk. 283; Keating *v.* Keating, Llo. & Goo. t. Sugd. 133; Evans *v.* Jackson, 8 Sim. 217.

(I) He had a power of leasing, but the new lease was void under the power.

settlement, which had not been taken into consideration by the Court of Chancery in Ireland, the case was remitted back to that Court to proceed as might be just, and as was consistent with that judgment (*c*). Lord Eldon considered there was an absolute want of consideration. How could it be contended that the substituting for a lease for three old lives a lease for one old life and two young ones at the same rent, when the lands were worth double the old rent, was a transaction in which valuable consideration was given by the lessee? and the lessor covenanted absolutely for the validity of the lease, and, though he got nothing, he was liable for the value; and, further, the old lease remained in the hands of the lessee as a shield. And when they considered the temptation of an immediate sum of money held out to a young man greatly in want of ready money, and then the notion of wood being given to him, of which there was not a stick on the property, and that they did not find inserted in the lease what was agreed upon as to the planting of trees, it did appear to him that this was a lease without consideration, giving value for nothing; and from this and other circumstances he could not agree that the bill should be dismissed generally, or that the new lease was a subsisting lease at all. Lord Eldon did not rest much upon the alleged acts of confirmation in receiving the rent. If the old lease had been delivered up they would have been much more material. He proposed that the new lease should be declared void, as between the lessor and lessee, *without prejudice to the old lease.*

3. A lessee for lives, who transfers his whole estate, not leaving any reversion in himself, to another, although in the shape of a demise, and reserving a rent, with an express power of distress and entry, cannot avow under the Irish statute 25 Geo. 2, c. 13, which corresponds with the English Act of 11 Geo. 2, c. 19. This was decided in the House of Lords, reversing the decision of the Court of Common

(*c*) Knatchbull *v.* Kissane, 5 Dow, 389.

Pleas and of the Exchequer Chamber in Ireland (*d*). Lord Tenterden, in advising the reversal of the judgment, observed, that by the common law, both in England and Ireland, a person entering upon land and taking a distress, was bound to show and set out his title to the land. The statutes relieved landlords from this necessity, and enabled them to get payment of their rents by a shorter process, but by neither of the Acts was it permitted to avow for a rentcharge upon the land payable to one who had no reversion. Lord Wynford, who concurred, observed that there was no doubt but that the defendants in error had a right to distrain, and that they lost the advantage of it solely by the erroneous mode of putting their case on the record.

4. Where an agent and an attorney obtained from his principal a lease for an inadequate consideration, which the latter knew, but his distress compelled him to give way, and the attorney availed himself of the advantage of his situation, and thus obtained the lease at an undervalue, it was set aside upon equitable terms (*e*).

5. In Rhodes *v.* de Beauvoir (*f*), where the Vice Chancellor, Sir L. Shadwell, had set aside a lease as having been unfairly and improperly obtained, he rejected the evidence of the solicitors of the lessor, who had also acted for the lessee, and obtained some benefits from him, and were made defendants in the suit. Upon an appeal to the House of Lords it was insisted that the solicitors were competent witnesses, and were made defendants only to exclude their evidence, and the House, upon the advice of Lord Brougham, C.,

(*d*) Pluck *v.* Digges, 2 Dow & Cla. 180; 5 Bligh, N. S. 31; 2 Huds. & Bro. 1. The Judges were divided in opinion, and delivered elaborate judgments. See Parmenter *v.* Webber, 8 Taunt. 593; Thorne *v.* Woolcombe, 3 Barn. & Adol. 586; and as to other remedies, see Baker *v.* Gostling, 1 Bing. N. S. 19; Wollaston *v.* Hakewell, 3 Mann. & Gran. 297.

(*e*) Ward *v.* Hartpole (1776), 3 Bligh, N. S. 470.

(*f*) 6 Bligh, N. S. 195; 6 Cla. & Fin. 532; and see Attwood *v.* Small, 6 Cla. & Fin. 232.

Lord Eldon, Lord Plunket, and Lord Wynford, directed the Court below to send issues to try the question of fraud and imposition, and whether the lessor knew that the solicitor acted for the lessee as well as for himself, and whether the lease was at an undervalue in the two views, that the lessor did or did not intend to favour the lessee, and finally, whether he did intend to favour him. In exercise of the power given by the House issues were directed, and the solicitors were to be examined [two being dead, their depositions were to be read], and after a trial of eight days, the lessor had a verdict on all the issues, and the bill therefore stood ultimately dismissed. It always appeared to me a dangerous step to send an issue of fraud depending on nice circumstances and equitable grounds to a jury, but the object was to give to the lessee the benefit of the evidence of his witnesses (*g*).

6. Trustees of a charity estate in Ireland in 1710 granted a lease for lives, renewable for ever, at a rent of 100 *l.* a year, for 300 *l.* fine, and a fine of 25 *l.* was to be paid on the dropping of every life for a renewal. Lord Plunket, C., dismissed an information filed by the Attorney-general to set aside the lease, and upon an appeal to the House of Lords the decree was affirmed, upon the motion of Lord Brougham, C. He said that he could not take upon himself to say in 1834 that the land was let at an undervalue at the time it was leased. The length of time for which the lease was granted was not an objection, as at that time the course was in Ireland to let leases upon covenants for perpetual renewal. The trustees were bound to do what a prudent landlord with his own estate would do, and it was past all doubt that such a landlord acting at that time would have done so. The complaint of abuse must not be simply that he had not selected that mode by which the lease, if granted now, would be rendered most profitable. And although time in itself was not a bar, yet it was in

(*g*) See 6 Cla. & Fin. 356.

such a case a powerful obstacle in the way of any court of judicature (*h*).

7. Lord Brougham, C., observed also that he would put a case where he conceived the trustees could not do their duty to the charity if they did not alienate a part of the land: supposing there was a small piece of land, a corner of land, or an outlying estate, property of the charity, and for the sale of which there could be got, on account of its peculiar situation, so large a sum as 1,000 *l.*, though the profits might never exceed 1 *l.* or 10 *s.* a year: it would be perfect madness not to sell the land for 1,000 *l.*; nay he went further, and stated that the trustees would have been guilty of an abuse of trust if they had hesitated to part with the land on those terms, and that an information at the suit of the Attorney-general, or of any relator, might well have been maintained against them to compel them to do that which was for the real benefit of the charity. These observations were not necessary for the decision of the case before the House, and it would be unsafe to act upon them: no prudent trustees of a charity would venture to sell, and of course no prudent purchaser would accept a conveyance from them. The power of the Court depends upon a different principle (*i*).

8. In Galway *v.* Baker (*k*), a reservation in a lease of lands in Ireland for lives of all mines, minerals, and royalties, and also all wood, and underwood, timber, and timber trees standing, growing, or being on the lands, *or at any time thereafter to stand or grow thereon,* with full and free liberty of ingress and egress, to take and carry away the same, was held by force of the statutes in Ireland for encouraging the growth of timber not to extend to trees

(*h*) Attorney-General *v.* Hungerford, 2 Cla. & Fin. 357; 8 Bligh, N. S. 437.

(*i*) See Corporation of Newcastle *v.* Attorney-General, 12 Cla. & Fin. 410; 5 Beav. 307; and see Attorney-General *v.* Kerr, 2 Beav. 420; Attorney-General *v.* Brettingham, 3 Beav. 91; Attorney-General *v.* Corporation of Newark-upon-Trent, 1 Hare, 395.

(*k*) 7 Cla. & Fin. 379; West, 467.

planted by the tenant subsequently to the granting of the lease, and duly registered; the House affirming the judgments of the King's Bench and of the Exchequer Chamber in Ireland.

9. Where a lease for lives renewable for ever was granted in Ireland in 1719 of all that part of a certain townland containing 509 acres of arable meadow and pasture, bounded as therein particularly described, with all the rights and appurtenances thereunto belonging, excepting all mines, minerals, and quarries of stone and coal, and all timber and wood above and underground, &c., under which, and subsequent renewals, the lessees had always held 400 acres more of bog within the boundaries described; it was held—by the Judge at *nisi prius*, and afterwards by the Courts of King's Bench and the Exchequer Chamber in Ireland, and their judgment was affirmed by the House of Lords without hearing the counsel of the respondent—that the whole of the bog being situated within the ambit of the boundaries, passed by the lease and renewals (*l*).

10. We may here state that the Act of 4 & 5 Will. 4, c. 22, for the apportionment of rents, extends to Scotland (*m*).

(*l*) Jack *v.* M'Intyre, 12 Cla. & Fin. 151; 3 Ir. L. Rep. 140; 5 Ir. L. Rep. 229.

(*m*) Fordyce *v.* Brydges, 1 H. of L. Cas. 1.

SECTION III.

OF COVENANTS.

1. *Covenant to repair, with allowance to tenant for additional buildings, how enforced where he rebuilt.*

2. *Purchase by lessee extinguishes his right under covenants for title in his lease.*

1. In a lease of a farm in Scotland, with a servants' house, stable, &c., and also cottages inhabited by sub-tenants, the tenant covenanted to repair all the houses in sufficient tenantable condition and leave them so (but the timber in the sub-tenants' houses was then to be valued, and again at the end of the term, and the outgoing tenant was to pay or receive the difference, from which Lord Redesdale supposed that the timbers were in a state of decay, and it was foreseen that it would be necessary to substitute new timbers), and it was provided that in case the tenant should build an *additional* farm-house and offices [a steading] he should have allowance of the value at the end of the lease by valuation. The tenant pulled down the old buildings and erected a new farm-house with offices. Lord Eldon, C., considered that the landlord standing by and permitting the tenant to rebuild did not vary the case. Lord Redesdale observed that in ordinary cases not governed by contract, if a tenant pulls down and rebuilds he is entitled to no allowance. Lord Eldon held that the tenant could not claim more than he would have been entitled to demand if the obligations had been observed as to keeping the old buildings in repair and making the additions of the new ones. Lord Redesdale said that when, without authority, the tenant substituted new buildings for the old ones, all the covenants applicable to the old became obligatory as to the new buildings. The tenant was to have allowance only for ameliorations. The

landlord was not to be deprived of the old buildings and to pay the full value of the new ones without compensation for the repairs which the tenant was bound to make. The Lords by their judgment found according to these views, and that the tenant was entitled to the value at the time of removal, of so much of the new buildings as ought to be considered as additional buildings, and not as a substitution for the old ones (subject to the provision as to the timber of the cottages) (*a*).

2. In the Scotch case of Paton *v.* Brebner (*b*), Lord Eldon, C., said he conceived it to be the settled doctrine of English law—if a lease be made of a house or estate, the lessor having [produced] no title, and the instrument by which the lease is made contain nothing more than words of demise, with a general covenant that the lessee shall enjoy the premises as long as the relation of lessor and lessee continues—in such a case the lessee does not usually look into the lessor's title, but he takes a covenant which binds the lessor that he shall have the enjoyment of the thing demised. But if that lessee afterwards becomes the purchaser of the inheritance of the estate, the consequence is, that having assumed the character of vendee, it becomes his duty to call upon the vendor to show that he can make a title to the inheritance, and as vendee he subjects himself to the necessity of using diligence to investigate that title, which he takes or refuses as he may be advised. With respect to covenants, he can have nothing more from the very person who as lessor has entered into an absolute covenant, if he might so express it, for his enjoying the premises in the relation of lessee—he can have no covenants except such as belong to the title and interest vested in the individual who, ceasing to be lessor, takes upon himself the new character of vendee. If he claims his estate under a will, the vendor covenants only against the acts of

(*a*) Sinclair *v.* Manson, 3 Bligh, 21.

(*b*) 1 Bligh, 68–70; see sect. 4, pl. 1, *infra*.

his devisor and himself. If he claims by descent, his covenant is adapted to that species of title, but inasmuch as he and those under whom he claims had taken the title at the hazard of limited covenants, he transmits the estate and title with such limited covenants from himself, and the relation of vendor and vendee when acquired by conveyance of the inheritance puts an end to the covenants though ever so large and general, which existed between lessor and lessee. Undoubtedly the vendor might concede the advantage which by law he derived from the new relation of vendor and vendee, and as the purchase is a matter of option, the vendor may warrant, at the risk of any damages which could be recovered against him, those liberties and privileges which he as lessor had agreed to give the lessees. But such a contract between vendor and vendee must be expressed in terms which are free from doubt and ambiguity. The terms of a contract so special must indicate unequivocally what was the intention of the parties.

SECTION IV.

OF COVENANTS FOR RENEWAL (*a*).

1. *Haig* v. *Hogan*: *purchase of original and of under-lease does not affect annuities granted out of interest of under-lessee.*
2. *Points decided*: *priority of rents and fines*: *covenant not running with land.*
3. *Rutledge* v. *Rutledge*: *agreement to settle leasehold for lives renewable, then purchase and devise of fee*: *right of renewal remains. Election.*
4. *Points decided in the case.*
5. *Right of renewal modified in consequence of subsequent circumstances.*
6. *Davis* v. *Hone accordingly.*
7. *The several decrees, with observations thereon.*
8. *The decree in the Lords, with observations thereon.*
9. *What is not a covenant for perpetual renewal.*
10. *Where a covenant to renew amounts only to a covenant to confirm the lease.*
11. *Butler* v. *Mulvihill*: *new lease to a third person (where right to renewal doubtful) set aside for fraud*: *upheld as to interest obtained by original lessee.*
12. *Observations thereon.*
13. *New lease to trustee, a trust although no covenant to renew, and he took the lease for his own benefit.*

1. In Haig *v.* Hogan (*b*), lands belonging to the See of Kilmore were demised to *A.* for 21 years at a rent, and the lease was renewed as usual upon fines. *A.* underlet the property at rents and renewal fines, and covenanted to renew when he should renew with the Bishop upon payment of rent and fines. These under-leases vested in Rawson, and he by a deed in 1809 granted annuities for lives, and assigned the leaseholds to a trustee upon trust to pay the head rent and renewal fines, and subject thereto to pay the annuities, and Rawson covenanted to keep up the lease for the benefit of the annuitant and for securing the payment of the annuities (I). The under-leases expired in 1811 and were not renewed. In August 1814 Haig purchased the original lease then

(*a*) See sect. 2, *supra*, pl. 1, 2, 5. (*b*) 4 Bligh, N. S. 380.

(I) This appears from the arguments and from the reasons, but I do not find the covenant stated in the Reports or in the Printed Cases. There was also a charge of two of the annuities on fee-simple estates, but this is not material.

existing from the See, which was assigned to him, and he renewed it in 1816 and paid large fines. Rawson, the under-lessee, became a bankrupt, and in September 1814 Haig purchased his interest of his assignees, which was assigned to Haig, and he thus became the original lessee under the See, and entitled in equity to the under-lease, subject to the annuities. Nothing can be more simple, and yet few cases have led to more embarrassing litigation or longer reports. Upon a bill filed by the annuitants, Lord Manners, C., after in effect overruling the Master's report that the rent and renewal fines due to Haig as the assignee of the original lease were the first charge on the leaseholds, and the annuities were then payable, by a decree in 1826, in substance established the annuities as the first charge on the leasehold estates, generally. Upon an appeal to the House of Lords this decree was reversed, and it was decreed that the arrears of rent and fines were charges prior to the annuities, and Haig was decreed to renew the under-leases to the trustee of the deed of 1809 upon the trusts of that deed. Lord Eldon, C., observed that it was contended that Haig stood in the place of Rawson, and that he was therefore liable to pay the annuities without deducting the rents and fines. But when Rawson pledged the lease as a security for the payment of the annuities, did he do more than transfer the beneficial interest in the lease? The covenant did not run with the land; it was personal to the covenantor. In moving the House to reverse the decree, Lord Eldon observed that by the grant the annuities were postponed until the rents and fines were paid. The lands were leaseholds. It was perfectly clear, therefore, that a charge upon the land must be subject to the rent and fines, which must be paid in order to preserve and perpetuate that interest, the rents and fines being the first and prior charge. The assignee takes the lease and comes into the shoes of the assignor, and pays the rents and fines, which must be paid in order to give to him the benefit of the security. The annuitants came in as under-lessees, and, under the *toties quoties* clause, having a

clear right to the benefit of renewal to them as under-lessees as often as the mesne lessee obtained his renewal from the Bishop. To that they had a right, and no more, and were subject to the payment of rent and fines.

2. The points of law decided in the House of Lords were, 1. That Rawson's covenant to keep the leases renewed was personal only and did not run with the land, which of course it could not do: in truth Rawson had no legal interest left in him, if even such a covenant could have bound him if he had(I). 2. That although Haig had purchased both the original and under-leases, yet he was bound to renew according to the covenant of *A.*, from whom he purchased the original lease. 3. That the union of the two characters in Haig of assignee of the original lease and of the under-leases, did not prejudice his right to the corresponding obligation of the annuitants, as being in effect the under-lessees, to pay the rent and fines on obtaining the renewals. The two characters were still held to be distinct as regarded the obligations and rights of Haig as owner, and of the annuitants as incumbrancers of the previous owner of the under-leases.

3. In Ruttledge *v.* Ruttledge (*c*), the owner of a leasehold for lives renewable for ever, who agreed to settle it on a son's marriage, and afterwards purchased the fee and devised it, was held not to have affected the right of renewal. The leasehold estate in question was agreed to be settled by Peter Ruttledge on his son Thomas's marriage, upon himself

(*c*) 2 Bligh, N. S. 352; 1 Dow. N. S. 331.

(I) From the abstract of the case, Mr. Bligh seems to have supposed Lord Eldon's observation to have applied to the covenant for renewal in the under-leases, and this has misled others. The cause was remitted to the Court of Chancery in Ireland, where further proceedings were had. Sir E. Sugden, C., made a decree in January 1835, in effect conformable to the decision in the Lords; from that there was an appeal to the House of Lords, on the ground that provision was not made for repayment to Hague of rents received by the annuitants, but the appeal was dismissed; 8 Cla. & Fin. 320. The decree of 1835, in point of form, gave the annuitants a right to a renewal upon payment of the rent and fines, and in case of default dismissed the bill with costs. The annuitants did not pay the rent and fines, and consequently (as regarded the leaseholds) their bill was finally dismissed with costs.

for life, remainder to Thomas for life, remainder, subject to a jointure for the wife, to the first and other sons of the marriage in tail male, with remainder to Peter, his heirs and assigns. Peter subsequently bought the fee of the lands in the lease, and of other lands, and by his will bequeathed to Thomas his leases for lives and years, and devised all his estates of inheritance to the use of Thomas for life, remainder, as to his Mayo estate (where the leaseholds were situated), to his grandson Peter, the only son of the above marriage, for life, remainder to his sons in tail male, with like remainder to Richard and his sons, and then to William and his sons, remainder to David, his nephew, for life, remainder to his first and other sons in tail male, reversion to the testator's right heirs. And the testator, in case his grandson Peter should marry in his father's lifetime without his consent, or should not settle his interest in the above lands which, under the settlement, he would become entitled to on his father's death, to the uses to which his estates were thereby limited, upon the desire of his father, declared that in either case Thomas might, at his pleasure and in his discretion, deprive him of the use for life thereby limited to him of his estates; and power was given to Thomas to charge his real estates of inheritance in Mayo with 5,000 *l.* Thomas, after his father's death, exercised the power to charge the 5,000 *l.*, but consented to his son's marriage, and did not exercise the power of deprivation; on the contrary, on Peter's marriage, he joined with him in conveying the leaseholds to trustees for the lives and of such other lives as should afterwards be added under the covenant for perpetual renewal, upon certain trusts for himself and his son and the issue of the marriage, with the ultimate trust for Thomas, his heirs and assigns. Peter, the grandson, died without issue in his father's lifetime, so that under the trusts of the last-mentioned settlement the leasehold estate vested in Thomas, his grandfather. Thomas, in the grandson's lifetime, settled his reversionary interest in the leaseholds on Robert Ruttledge and his intended wife

and their issue, still reserving the reversion to himself, which he ultimately released to Robert, and he renewed the lease to Robert for two new lives, at the former rent and with a covenant for perpetual renewal at the old fine [he was but tenant for life of the inheritance under his father's will]. Robert Ruttledge enjoyed the leaseholds for lives, and after the death of Thomas, paid the original rent to Richard, whose remainder in the inheritance under the will of Peter, the elder, fell into possession on the death of Thomas. Richard and William, the remainder-men under the will, both died without issue male. Robert filed a bill for a renewal of the lease against David, the next remainder-man, for life, and his son tenant in tail, and Lord Manners, C., decreed a specific execution of the covenant for perpetual renewal; and upon an appeal to the House of Lords that decree was, upon the motion of Lord Lyndhurst, C., affirmed.

4. In this case several points were decided, although no statement was made of the grounds of the decision.—1. That although by the purchase of the fee in the leaseholds, the lease for lives was merged, yet Peter, the settlor and purchaser, was a trustee of so much of the inheritance as represented the leasehold interest for the persons entitled under the articles, and as owner of the inheritance was still bound in equity by the covenant for renewal. 2. That no case of election was raised by the will of Peter. 3. That the power to deprive Thomas of his life estate was simply discretionary (*d*). None of these questions was open to any doubt.

5. Where, owing to subsequent circumstances, it has become inequitable to enforce a *specific* execution of a *toties quoties* covenant for renewal, equity will not wholly withhold its aid, but will, on the demand of the party entitled, compel a renewal on equitable terms; that is, will modify the contract of the parties. The doctrine has even been carried further, and it has been said that where in such

(*d*) See Powers, sect. 1, pl. 1, *supra*.

a case large damages have been recovered at law, the person liable to pay them may file a bill for relief against the covenant, as become by circumstances a covenant which it was unconscientious strictly to enforce, and offer to perform it according to conscience (*e*). This is a jurisdiction which should be sparingly exercised.

6. In Davis *v.* Hone (*f*) it appeared that a lease had been granted about the year 1650 by a dean and chapter for 21 years, at the yearly rent of 10*l.* 12*s.* 6*d.* The usage then was to renew every seven years, at the same rent, on payment of a fine. The lessee granted an under-lease for 16 years at double the original yearly rent, and covenanted to endeavour to renew with the dean and chapter and then to renew with the under-lessee for a further term of seven years, the latter paying to his lessor 300*l.* as a fine for every renewal, and also paying double the yearly rent to be received by the dean and chapter and no more; and the under-lessee covenanted on every renewal to pay the fines and rents. It does not appear what fine was paid in 1650, but previously to 1796 the dean and chapter were in the habit of somewhat increasing the fine. On a renewal subsequently, it was agreed that in case the sub-lessees should, upon any future renewal by the dean and chapter to the head lessee, apprehend that the reserved rent was too much advanced, it should be at their election whether they would accept of a renewal or refuse the same, and be content with the residue of the term in their lease then unexpired. In 1796 the fines having been much increased, the sub-lessees agreed to contribute more than the 300*l.* upon that renewal, in consideration of the lessee under the dean and chapter granting a renewal for 2½ years longer than the term

(*e*) See 2 Sch. & Lef. 348, 351, per Lord Redesdale, who does not seem to have stated the case of Errington *v.* Aynesley, 2 Bro. C. C. 341, correctly. See Smith *v.* Morris, 2 Bro. C. C. 311; Evans *v.* Walshe, 2 Scho. & Lef. 519; Revell *v.* Hussey, 2 Ball & Beat. 280.

(*f*) 2 Scho. & Lef. 341; 2 Dow, 546; Printed Cases, D. P. 1813, 1814.

originally fixed, and covenanting again to renew, as in the original under-lease. This was accordingly done. Subsequently Hone purchased the original lease, and in 1801 the dean and chapter required a fine of 1,035 *l.*, and he not being able to make terms with his sub-lessees, proposed to the dean and chapter to pay a fine of 500 *l.* and an additional rent of 80 *l.*, which, on a memorial from the sub-lessees, the dean and chapter refused to accept. The sub-lessees, who had built on and otherwise improved the estate within the last 60 years, ultimately offered to pay the whole of the fine, and to pay all future fines, leaving to Hone his profit rent clear. Lord Redesdale, C., upon a bill filed by the sub-lessees, in effect decreed a performance according to the offer of the sub-lessees, but depending upon the consent of Hone. He said that the Court ought not to give specific performance according to the letter of the covenant, for that would be unconscientious against the defendant in consequence of the change of circumstances. But because the plaintiffs ought not to have the covenant performed literally, they were not to lose their property entirely. The Court would execute the covenant according to a conscientious modification of it, to do justice as far as circumstances would permit. It may refuse specific execution unless the party seeking it will comply with a conscientious modification of the covenant in the mode of executing it. For 150 years all the persons interested made themselves parties to the abuse of the power of renewal by continually increasing the fine and not the rent, and all the improvements had been made on the faith of the continuance of that abuse. The fine had been increased on account of the improvements (I), of which the tenant had had the benefit, and they should therefore in conscience pay the increase upon the fine. The result was that the plaintiffs were entitled to have the lease renewed at the old rent

(I) See the Master's report, *infra*.

and a fine, but the amount of the fine must be according to the pleasure of the dean and chapter, and it must greatly exceed the value of Hone's interest in the property. It would therefore be unconscientious to require him to pay all but 300 *l.* This being unconscientious, was a ground for the Court to say it would not make a decree, but leave the parties to an action at law, unless the plaintiffs would agree to a conscientious arrangement.

7. A decree was made, enabling the sub-lessees to renew the lease with the dean and chapter, in the name of Hone, with his consent, otherwise in the name of a trustee, they consenting to pay the whole fine and fees, and with directions for renewal of the under-lease, calculated to carry the view of the Court into effect. But if Hone should refuse to accept such terms, and the renewal should be obtained in the name of a trustee, the decree reserved the question whether Hone should be compelled specifically to perform the covenant for renewal, or to perform the same on any and what terms. Hone not having consented that the lease should be renewed in his name, a trustee was named, and the decree became inoperative as to the terms upon which Hone was to renew. The dean having died in the meantime, the new dean demanded a fine of about 4,300 *l.*, which was paid by the sub-lessees, and a renewal obtained in the name of a trustee. Upon further directions the sub-lessees insisted that they were not then bound by their offer, and demanded the judgment of the Court, and thereupon a decree was made that the trustee should execute new leases to the sub-lessees, *pursuant to the covenant in the former leases:* and the Master was directed to inquire what proportion of the fine ought to be considered as having been demanded in respect of the increased value of the lands produced by the improvements made by expenditure thereon since the original lease, under which the sub-lessees claimed, beyond the ordinary expenditure of a tenant, and what part of the fine ought to be considered as paid in respect of the value of the land

exclusive of such improvements; and out of what should be found to be the proportion of the fine which would have been demanded if no such extraordinary improvements had been made, the 300 *l.* was to be deducted, and the sub-lessees were to stand as creditors on Hone's interest in the renewed leases for the remainder, together with the expenses of the renewal and interest. Lord Redesdale, therefore, when compelled to make such a decree as the rules of the Court warranted, held that the covenant was still binding on the parties, except so far as the fine was increased by extraordinary improvements made by the sub-lessees, for which extra amount they were to pay. This, therefore, was so far a modification of the covenant for renewal in favour of Hone, the defendant, but still in effect the decree operated as a decision against Hone's right to treat with the dean and chapter for a less fine and greater rent. But the decree on further directions laid down no precise rule for further renewals, but ordered that the sub-lessees should be at liberty from time to time to apply to the Court for renewal of the lease, *according to the covenants for renewal therein*, and for that purpose for a surrender of the lease made to the trustee, *and for adjusting the fine to be paid between themselves and Hone* as they should be advised. So that the Court took upon itself the duty in all time to come to settle the terms upon which renewals should be granted; and it directed the sub-lessees to pay the rent as it became due, and gave Hone liberty to apply in case of nonpayment. The Master reported that the whole of the fine had been demanded in respect of the ordinary value of the lands. This report, therefore, destroyed the whole force of the decree, for the decree authorized the sub-lessees to deduct the 300 *l.* fine, which they were bound to pay, or in other words, ordered them to bear the expense of renewal to that extent, and left Hone to pay the whole of the rest of the fine, as he was bound to do, according to the strict and legal operation of the covenant. But the decree assumed that in consequence

of improvements, a large portion of the fine beyond the 300 *l.* would fall on the sub-lessees. The result, which was not foreseen, was, that Hone was prevented from increasing the rent and lessening the fine, and yet was bound by the decree to pay the whole of the fine to the dean and chapter, and to require only the 300 *l.* fine from the sub-lessees. Hone reheard the decree before Lord Chancellor Ponsonby, and he "inasmuch as the plaintiffs, the sub-lessees, have offered to pay the 1,035 *l.*, the sum required by the late dean for the renewal," varied the decree by making Hone's interest in the estate stand as a security to the sub-lessees for the difference between that sum and the 4,300 *l.* (in round numbers) actually paid for the renewal. The rehearing seems to have occupied five days, but no report is given of the arguments or of the judgment. Now this decree must have proceeded upon a wholly different ground. It compelled Hone to pay the increase in the fine beyond the 1,035 *l.*, manifestly because that would not have been payable had Hone accepted the offer to pay the latter sum. But the original decree did not affect to compel him to accept the offer, and when he declined to do so, and the case came on for further directions, the sub-lessees, as it appears by the report, insisted they were not bound by their offer to pay the whole fine and fees, and demanded the judgment of the Court upon the case. Lord Chancellor Ponsonby appears to have acted upon a renewed offer by the sub-lessees to pay the 1,035 *l.*, notwithstanding their retractation of their first offer, which undoubtedly was a strong measure, and thus to have avoided the difficulty presented by the Master's report in executing the decree on further directions, according to the intention of his predecessor.

8. Upon an appeal to the House of Lords against the three decrees the appeal was dismissed, and the decrees complained of were affirmed without observation (I); at least

(I) And without distinguishing the decrees, although the last partially reversed the second; Lords' Journ. vol. 40, 926.

the report does not contain any. This is to be regretted in a case depending upon such a very powerful jurisdiction in a court of equity. The principle laid down by Lord Redesdale, that the Court would leave the party to law if asking for equity, he would not do equity, is of course admitted. But the difficulty consists in compelling the adverse party not to execute the contract by which he is bound, but such a modification of it as the Court deems equitable. Where a party gets from the Court all that he could obtain from the other party to the contract, and is merely prevented from abusing his legal right, the jurisdiction may be admitted (*g*) (I). If therefore Hone, as the original lessee, and bound by the covenant for renewal, was, according to its legitimate construction, entitled only to the net profit rent reserved to the immediate lessee by the under-lease, no fault could be found with Lord Redesdale's opinion, for a decree founded upon it would have secured to him all to which he was entitled. But was that the true meaning of the contract? It might be improvident, but the parties expressly stipulated that the under-lessee was to pay only 300 *l.* towards every fine and double the yearly rent, and although the probability was that every dean would prefer a larger fine to an increase of rent, yet this was left to chance and contract, whilst on the one hand double the yearly rent was to be reserved on every renewal, and on the other, any undue increase of rent was guarded against by the subsequent agreement giving to the sub-lessees the power to refuse a renewal, and to hold for the unexpired term. The Court of Chancery and the House

(*g*) See Errington *v.* Aynesley, 2 Bro. C. C. 341; 2 Dick. 692.

(I) In Errington *v.* Aynesley the bill was filed by the *contractor* to build the bridge, and prayed that the plaintiff might be relieved from the bond and agreement upon such terms and in such manner as the Court should direct, and for a reference to the Master, or that an issue might be directed to try or that it might be otherwise settled, to inquire what compensation and satisfaction (if any) under the circumstances the plaintiff ought to make to the defendant touching the matter in question, and in the meantime for an injunction. Belt's ed. of Bro.

appear to have executed altogether a different contract between the parties.

THE CONTRACT OF THE PARTIES.	THE CONTRACT AS ENFORCED BY THE HOUSE OF LORDS.
Under-lease to be renewed upon payment by the under-lessee of 300 *l.* as a fine, and paying double the yearly rent reserved by the dean and chapter.	Under-lease to be renewed upon the under-lessee consenting to pay the whole of the fine required by the dean and chapter, but at the rent reserved by the first under-lease.
If the under-lessee thinks the rent too much advanced, he may refuse the renewal and hold for his unexpired term.	The option, therefore, reserved to the under-lessee to refuse a renewal is rendered unnecessary.

The decree *in effect* placed the under-lessee in the shoes of Hone as immediate lessee of the dean and chapter, subject to a fixed rent of 107 *l.* 12 *s.* 6 *d.* to Hone, and thus deprived the original lessees of *all* benefit from the improvement of the property by the gradual rise in value of the land; and yet it appeared, as we have seen from the Master's report, that the whole of the fine of about 4,300 *l.* had been demanded in respect of the ordinary value of the lands. Lord Redesdale did not venture to support his original views by a decree; but, on further directions, acted upon a principle, to which it appeared that the facts had no relation. Lord Chancellor Ponsonby appears to have carried Lord Redesdale's first views into execution (for I put out of the question the excess in the fine beyond the 1,031 *l.*, as depending upon a different ground), although he himself did not act upon them, and the House of Lords affirmed the last decree. To Hone, the owner of the original lease, it became wholly unimportant which of the decrees was sustained, if one

was to be upheld, for the sum charged on his interest by either greatly exceeded the value of the rent reserved to him; in short it amounted to an extinction of his interest. Thus, to save the sub-lessee from the *literal performance of his covenant* to pay a fixed fine of 300*l.* and double rent, which would have increased his rent by 160*l.* at the end of 150 years, which the value of the property would evidently have well borne, but which he had power to reject altogether if he pleased, the property of the original lessee, *contrary to his obligation*, was wholly transferred to the under-lessee. The result is not such as should have been the consequence of an appeal to the highest court of judicature. Intending, upon equitable grounds, to relieve the sub-lessee from what was deemed an unconscientious enforcement by his lessor of a legal obligation, the interest of the latter was wholly destroyed (I).

9. An ancient lease for three lives, with an endorsement on it that it was agreed, that upon the renewing or inserting of any life or lives, there should be paid by the lessee, his heirs or assigns, unto the lessor, his heirs or assigns, the sum of 16*l.* 16*s.* 4*d.*, does not amount to a lease with a covenant for perpetual renewal (*h*).

10. In a lease granted of lands in Ireland in 1663 for 98 years, without impeachment of waste, and with power to cut the woods, and to search for and work the mines; the lessee planting a certain number of trees, the lessor covenanted, "from time to time to *renew* the said lease, and perfect such other further assurances as the lessee, his executors, administrators, or assigns should reasonably, with

(*h*) Smyth *v.* Nangle, 7 Cla. & Fin. 405; West, 184; 1 Jebb & Sym. 199; 1 Law Rec. 3d S. 119. The decision of the House of Lords, reversing the decree of Lord Plunket, C., was on the ground that improper issues were directed. The point in the text admitted of no doubt.

(I) The first decree gave no costs up to the hearing; no costs were given on the rehearing or on the appeal.

their counsel learned in the law, devise, advise, or require, for the better strengthening, confirming, and sure-making of all the demised premises unto the lessee, his executors, administrators and assigns, at such rents and under such covenants and conditions as contained in said indenture of lease:" and further, the lessor, his heirs and assigns, should from time to time, and at all times thereafter, pay all quit-rents and other rents due or thereafter to be due: and that the lessor, &c., would warrant the title against all persons claiming by, from, or under him; and that in case of any eviction by any person lawfully claiming any right to the premises, or that the premises should be wasted or decayed by any war or rebellion, so that the tenants could not possess the same with safety to their lives or goods, then and for so long the said rent should cease and be abated. The Court of Exchequer in Ireland held, that notwithstanding the use of the word renew, the covenant was not, as was insisted, a covenant for perpetual renewal, but merely a covenant to confirm the lease itself for the 98 years: and upon an appeal to the House of Lords, the decree was, upon the motion of Lord Brougham, C., affirmed, with costs (*i*).

11. Where all the lives in a lease for lives renewable for ever of lands in Ireland had died, and it was doubtful whether the right of renewal was not lost, but a new lease for lives at the old rent and fine, with a covenant for perpetual renewal, was obtained from the heir of the lessor by a person (John Brady) who claimed under an alleged will of the heir of the lessee in the original lease, and afterwards upon a compromise and agreement between them Brady declared himself a trustee of the new lease for Philip Ringrove, the heir of the first lessee, and Philip thereupon granted a lease of the premises to Brady for three lives at an increased rent, renewable for ever: upon the dropping of a life in the new head lease,

(*i*) Brown *v.* Tighe, 2 Cla. & Fin. 396; 8 Bligh, N. S. 272; Hayes, 158; 4 Law Rec. 28, 123.

the then heir of the lessor refused to renew it on the ground that Brady obtained it, not as a renewal, but as a new lease, and by fraud and imposition: Lord Manners, C., decreed a renewal in favour of Philip and those who claimed under him. Upon an appeal to the House of Lords his decree was, upon the motion of Lord Redesdale, reversed. The order of the Lords declared that the lease to Brady from the heir of the lessor was obtained by fraud, and was thereby deemed void so far as Brady had any interest after the agreement with Philip, but without prejudice to the rights gained under the agreement by Philip, inasmuch as it did not appear that Philip, under the particular circumstances of the case, might not, if he had established his right as heir in contravention of the will under which Brady claimed, have been entitled to have compelled a renewal in his favour of the original lease, and especially as the execution of the lease to Brady compelled Philip to assert such right as against Brady; and it was declared that the heir of the lessor being as such charged with the effect of such agreement for the benefit of Philip, was entitled to the benefit which Brady might claim under the agreement and the lease from Philip to Brady. The order then directed a renewal to be executed to the persons claiming under Philip by the heir of the lessor according to the original lease, and a lease by them to the same heir according to the lease granted by Philip to Brady (*k*).

12. This was an unusual decree. Lord Manners must have considered the lease to Brady (although obtained improperly) as, in effect, an admission that the right of renewal was still in existence. The House of Lords held the lease to be void as regarded Brady, and therefore held that whatever interest remained in him belonged to the lessor; but still considered the lease to Brady, with the covenant for renewal, as a binding one, and as a renewal of the original lease,

(*k*) Butler *v.* Mulvihill, 1 Bligh, 137.

so far as Brady had relinquished the benefit of it to the heir of the lessee, who would have been entitled to renew if the right existed.

13. We may here, perhaps, refer to the case of Fitzgibbon *v.* Scanlan (*l*), where a trustee who was in possession, to secure a charge under a settlement at the time the lease expired, which was not renewable, obtained a new lease in his own name, declaring it was not for the benefit of the *cestuis que trust*, and this after a public advertisement by the landlord that the property was to be let, yet the new lease was held to be a trust.

(*l*) 1 Dow, 261.

originally fixed, and covenanting again to renew, as in the original under-lease. This was accordingly done. Subsequently Hone purchased the original lease, and in 1801 the dean and chapter required a fine of 1,035 *l.*, and he not being able to make terms with his sub-lessees, proposed to the dean and chapter to pay a fine of 500 *l.* and an additional rent of 80 *l.*, which, on a memorial from the sub-lessees, the dean and chapter refused to accept. The sub-lessees, who had built on and otherwise improved the estate within the last 60 years, ultimately offered to pay the whole of the fine, and to pay all future fines, leaving to Hone his profit rent clear. Lord Redesdale, C., upon a bill filed by the sub-lessees, in effect decreed a performance according to the offer of the sub-lessees, but depending upon the consent of Hone. He said that the Court ought not to give specific performance according to the letter of the covenant, for that would be unconscientious against the defendant in consequence of the change of circumstances. But because the plaintiffs ought not to have the covenant performed literally, they were not to lose their property entirely. The Court would execute the covenant according to a conscientious modification of it, to do justice as far as circumstances would permit. It may refuse specific execution unless the party seeking it will comply with a conscientious modification of the covenant in the mode of executing it. For 150 years all the persons interested made themselves parties to the abuse of the power of renewal by continually increasing the fine and not the rent, and all the improvements had been made on the faith of the continuance of that abuse. The fine had been increased on account of the improvements (I), of which the tenant had had the benefit, and they should therefore in conscience pay the increase upon the fine. The result was that the plaintiffs were entitled to have the lease renewed at the old rent

(I) See the Master's report, *infra*.

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8. Upon an appeal to the House of Lords against the three decrees the appeal was dismissed, and the decrees complained of were affirmed without observation (I); at least

(I) And without distinguishing the decrees, although the last partially reversed the second; Lords' Journ. vol. 40, 926.

further delay: there was further delay, and a delay for a time which in itself was unreasonable even if there had been no neglect before. Lord Eldon said that he did not go to the length of saying that long neglect and supineness might not amount to fraud; he gave no opinion on that point (*b*).

3. It will have been observed that the covenants for renewal provided for the payment of interest on the fine in case of refusal or neglect to pay within four months after the dropping of a life. Under this provision the appellant insisted that he was entitled to a renewal when the third life dropped, according to the strict construction of the covenant. Lord Eldon said that a covenant would not be specifically executed by a court of equity if attended with the consequences which followed upon this construction. That construction was, that the tenant was not called upon to renew and pay a fine immediately on the dropping of any of the lives, but had the option to renew at any time during the existence of the third life, to postpone the renewal for 50 years, paying interest on the fines; whereas if on the dropping of any of the lives another were always immediately nominated, five, six, seven, eight, or ten lives might fall, and as many nominations take place in the course of these 50 years, and so many fines become payable to the landlord. That could not be the meaning of the covenant, or if it was, such a covenant was not one for specific execution in equity. We may, however, observe that if the case had been one of mere neglect, without demand from the lessor, as the case was literally provided for, and relief could only be given under the Act upon adequate compensation being provided for the lessor, equity might well have executed the contract. But it was altogether a different question whether the covenant to renew and pay the fine within four months after the dropping of a life was not

(*b*) See Butler v. Lord Portarlington, 1 Dru. & War. 50.

to be binding after the lessor had demanded the observance of it.

4. In the case of Lord Mountmorris *v.* White (*c*), the doctrines laid down in Jackson *v.* Saunders were repeated and enforced. The lease for lives renewable for ever, upon which the question arose, contained a negative clause—that if on the failure of any life the tenant should not pay to the lessor for any life so failing, the sums of 8 *l.* and 12 *l.* by way of fines, and nominate another life within 12 calendar months after the death of such life, it should be lawful for the lessor, his heirs and assigns, to refuse to renew at his or their option. Lord Eldon, C., although strongly opposed to that view, told the House that there was authority for the interference of a court of equity, and therefore he agreed that the election secured by the landlord was of no more avail than if there had been no such clause in the lease.

5. In the case under consideration, one of the lives dropped in 1784, although the tenant represented that it did not drop till 1786 (upon which, however, no stress was laid), and applications by the lessor for the fines commenced in 1788, when in effect inability to pay was the excuse; in 1796 on a meeting in a grand-jury room, the agent of the lessor asked the lessee why he did not pay his fines, adding he did not wish advantage to be taken *in case there were no further delay*: further applications were made without effect down to 1804. Early in 1805 the lessee applied to the lessor's agent for a renewal, offering as a consideration to relinquish a lawsuit against the lessor by the lessee and a third person, but in April in that year the lessor determined not to renew. In January 1806 the lessor filed a bill to perpetuate testimony, and in the succeeding February the lessee filed a bill for a renewal. The Court of Exchequer in Ireland decreed a specific performance upon the usual terms; but upon an appeal to the House of Lords

(*c*) 2 Dow, 459.

that decree was reversed. Lord Redesdale said that if the transaction in 1805 was connected with the suit against the lessor it was a new agreement within the statute of frauds; but he did not, under the circumstances, think it necessary to consider that question (l). He thought the case did not come within the equity of the Act. There was a demand in 1788, and it could not be argued with effect that because the lessor demanded for the tenth time he thereby forfeited the benefit of the nine first demands. If a person after several previous demands make another, and the last demand was immediately complied with, that would raise a different question. But it was impossible by a subsequent to destroy an original demand. Unless the subsequent demand was immediately complied with the original demand was that upon which the right was founded. Lord Eldon, C., concurred in this view; and he expressed his opinion that an inability to pay was not an accident or a cause of neglect, against which the Act intended to relieve. If the lessor acquired the right of refusal to renew he doubted whether it was competent to his agent to pass from it (*d*); but it was unnecessary to consider that question. He protested that unless they could decide so as not to relieve tenants from all control in these cases—so as not to give to *gross neglect and refusal* the character of *mere neglect*—it would be hardly possible to say, with any certainty, what was the law as between landlord and tenant in that country, and the landed property there would be put into such a state that no one could know how long he might be landlord, or what might be his duty as tenant. Lord Redesdale added, referring to the cases, that neither in that House nor in the

(*d*) See Townley *v.* Bond, 4 Dru. & War. 260.

(l) A mere waiver of the right to refuse a renewal on account of laches for a collateral benefit, would probably not be held to be within the statute; whilst the validity of the right of renewal remained undecided it could hardly be held to have been lost, so as to constitute the transaction an agreement for a new right. See Lord Eldon's observations, 2 Dow, 472.

House of Lords in Ireland was there any case in which relief was given where there appeared gross, wilful, and obstinate neglect.

6. All these points were again laid down in the case of Barrett *v.* Blake (*e*). A lease for three lives was granted in 1713 of lands in Ireland, at a rent of 50 *l.* with a covenant for perpetual renewal upon the payment of a fine of 25 *l.* for every new life. The last life died in 1772, and this lease was never renewed. The claim to a renewal arose under an under-lease and dealings between the under-lessee and the ground landlord. The original lease became vested in Nash, and he in 1761 granted an under-lease to Burke for three lives at a rent of 102 *l.* 10 *s.*, and with a covenant for perpetual renewal on payment of a fine of 25 *l.* for every new life. Burke covenanted within six months after the expiration of any life to name another and pay the fine, and Nash covenanted in three months afterwards to renew with the head landlord *at Burke's expense*. In effect, therefore, Burke was the owner of the original lease, and Nash had a profit rent of 52 *l.* 10 *s.* The under-lease was regularly renewed and the fines paid to Nash, who paid none to the original lessor, and the original rent of 50 *l.* was in arrear. The original lessors were in receipt of the rent of 102 *l.* 10 *s.* from December 1782 to the end of December 1799, first in discharge of the rent and arrears of rent due to them, and next in or towards satisfaction of the renewal fines; this, of course, was by an arrangement with Nash and Burke. The evidence was, in the House of Lords, held to amount to this, that the original lessor consented to apply what he received beyond the arrears of the head-rent towards the discharge of what was due to him on account of the fines, but that there was no contract that he would not call for the fines in any other manner. The evidence showed that in 1799 the original lessor applied to Burke for 200 guineas on account of the fines due, and informed him that unless he did without delay remit it he

(*e*) 5 Dow, 1.

would discontinue to receive Nash's profit rent, "but Burke did not remit one shilling more than his usual payment of the head-rent and some part of Nash's profit rent." The head landlord not being able to discover Nash's representatives, had a regular demand made, on 27 February 1801, on the lands of the renewal fines, &c., from the principal occupier, and also from the other occupying tenants, and a copy of the calculation of the renewal fines, &c., was served on Burke, and notice of the demand was published in the Dublin and London Gazettes for two months (I). In March 1801, Burke furnished an account of payments by him, from 1774 to 1779, to the head landlord, from which it appeared that he had paid considerably more than his own rent, and he alleged that the excess was paid on account of renewal fines. On the 27th November following Burke made a tender, including some dishonoured bills, and which, of course, was an invalid tender. In 1801 the head landlord brought an ejectment, and in the same year Burke filed his bill in the Exchequer. It is said that the Court of Exchequer seems to have thought, that if the head landlord accepted from Burke any part of the profit rent on account of the fines, he thereby bound himself to accept the whole in that mode of payment, and had waived the forfeiture. The Court tendered an issue to the head landlord to inquire whether he had received any money out of the lands on account of the renewal or septennial fines due under the lease, which issue he refused to try, and ultimately a decree for a renewal was made against him on the usual terms in favour of Nash's representatives, who were defendants in the suit. But upon an appeal to the House of Lords the decree was reversed, and the bill dismissed, upon the advice of Lord Eldon, C., and Lord Redesdale. It was considered that the issue tendered did not touch the merits, and that, though it had been tried and found against the head land-

(I) This was in compliance with the 2d sect. of the Act 19 & 20 Geo. 3, c. 30.

lord, it would not have been conclusive against him. Lord Redesdale repeated the opinions which he had held in the former cases. No formal demand he said was necessary, but the party having made it, the time is to be computed from the period of that demand, and the prior demands are waived by the subsequent formal demands, if the fines are paid within a reasonable period after that demand. But it was to be considered what former demands were made with reference to the point of neglect, and the question what was a reasonable time after the formal demand. He, like Lord Eldon, treated the case as one of wilful neglect. After the notice in 1801, Burke (who had in his power all the documents necessary for making up the account) was bound to offer the fines and the leases for execution, and one month was amply sufficient for those purposes: he suffered nine months to elapse, and then made not a real tender. It was a fraud in Nash the receiving the fines from his own under-tenant, without paying them over to the head landlord. It was clear then that the Nash family would not be entitled to renewal at their own suit. The only one to claim was Burke, whose claim was founded merely on the indulgence of the head landlord. Burke had no right, except under that indulgence, his remedy being only against Nash, and not against the head landlord. An objection was raised that the demand ought to be made upon and notice given to all who were interested, but this was overruled.

7. In Fitzsimon *v.* Burton (*f*) there was a negative clause; yet the Court of Exchequer in Ireland decreed a renewal, after considerable delay, principally on the ground that the service of the demand was not well proved. The facts were shortly these: A lease for three lives was granted in 1707, at a rent of 10 *l.*, with a covenant for per-

(*f*) Finlay on Renewal, 284. I was of counsel for the appellant. See Lawless *v.* Grogan, 1 Dru. & Walsh, 63; Fitzgerald *v.* O'Connell, 1 Jo. & Lat. 158.

petual renewal on payment of a fine of 5 *l.* on the dropping of every life within six months after such event, and nominating another life in lieu thereof. And it was provided that in the event of such payment and nomination not being made, in addition to the payment of the annual rent, within the time aforesaid, it should be lawful for the lessor, his heirs or assigns, for ever after to refuse a renewal, and that the premises, after the drop of the lives then existing, should be and remain unto the lessor, his heirs and assigns, and the deed and demise thenceforward to determine and be utterly void to all intents and purposes. All the lives in the last renewal dropped at the demise of George the Third, the last surviving life, and there was a large arrear of rent due. The estate of the lessor had vested in an infant in 1812, who came of age in 1821, and demanded the arrears of rent, which were considerable, with the renewal and septenial fines on the three last lives. The notice was served upon the servant of the lessee at the house of the latter in Lincoln. No notice was taken of this demand for nine months, when the lessor brought an ejectment, to which the lessee took defence, insisting upon adverse possession, which he afterwards withdrew and filed a bill; and the Court of Exchequer made a decree for a renewal, being of opinion that the service of the notice or demand had not been sufficiently proved. Upon an appeal to the House of Lords this decree was reversed, upon the advice of Lord Eldon, C., and Lord Redesdale. It was justly considered as a case of wilful neglect, and the negative clause was referred to. The service was deemed good, and it was held that personal service was not necessary (*g*). The statute had omitted to provide some convenient mode of making the demand where the tenant may be known but out of Ireland;

(*g*) See before this decision, Jackson *v.* Saunders, 1 Scho. & Lef. 465; Johnson *v.* Warburton, 2 Moll. 521; and see the later case of Lawless *v.* Grogan, 1 Dru. & Walsh, 53. Lord Palmerston *v.* Corporation of Dublin, Lyne, Renew. App. 74. A parol demand must be made personally on the tenant or his agent.

therefore the statute should be construed strictly in favour of the landlord in such case. There was a case for the lessor if he had served no notice. He brought his ejectment, and that surely was notice. The lessee took defence, and that was a denial of the landlord's title, and an important feature in the case, but the material part of the case was that there was a sufficient demand sufficiently proved.

8. Lord Eldon, C., observed, in the above-mentioned case, that if instead of adding one life to two lives, or, in certain cases, two lives to a third, all the lives are suffered to expire, can it be called mere neglect when the landlord is required to grant an entire new lease for three lives all at the same time? There is one very material thing to be attended to when we talk of adding a life; the obvious intent and meaning of the language is, that we are to add a life to a life, that is, with reference to some estate which has existence at the time, and not to a lease which had expired. During the whole three lives the estate had been enjoyed, and the persons who then asserted their right did so without any title whatever. But the case before the House was not decided upon that ground, and the cases previously decided in the courts in Ireland had established that relief might be given although all the lives had dropped, and the opinion expressed by Lord Eldon has not been considered as overruling that current of authority (*h*); but it is of course a circumstance entitled to weight.

9. In a later case (*i*), where the lease was for lives (renewable for ever by a subsequent agreement), at a rent of 150 *l.*, and a fine of 10 *l.* upon the dropping of every life; two of the lives had dropped, and the renewal fines had been paid, and new lives named. In 1808 the third life in

(*h*) Shenton *v.* Corbally, 1 Hog. 433–435; Butler *v.* Lord Portarlington, 1 Dru. & War. 64.

(*i*) Trant *v.* Dwyer, 2 Bligh, N. S. 11; 1 Dow, N. S. 125. I was of counsel for the appellant.

the original lease died. Trant, who was then the head landlord, gave notice in December 1810 to the tenant to pay the fines due (I), and to restore to him some bog which he alleged the tenant had improperly taken possession of, and to pay some specified sums for damages for cutting turf contrary to the covenant in the original lease, and that if the notice were not complied with he would not consider himself bound to renew. These latter claims led to a correspondence, during which, in 1812, one of the additional lives dropped, and in October of that year Trant refused to renew. In February 1814 the fines were tendered, and a bill filed in the Exchequer of Ireland for a renewal. That Court gave Trant liberty to bring an ejectment for the bog, and an action for the breach of covenant. Trant accordingly brought an ejectment, and recovered possession of upwards of 234 acres of bog, but the action of covenant which he brought having abated by the death of the tenant, he took no further step in regard to it, and the Court decreed a renewal, without prejudice to any action which Trant might be advised to bring for breach of covenant. From this decree Trant appealed to the House of Lords, but the decree was affirmed, on the motion of Lord Lyndhurst, C., with 100 *l.* costs. The Lord Chancellor observed that if the matter had rested there, there was no doubt but that the delay of three years would be an unreasonable neglect, and the tenant would have forfeited his right of renewal. But he considered the delay to have been occasioned by the disputes upon the collateral subjects, and that the landlord knew that the tenant was ready to pay at any time, and the tenant knew that the landlord would not receive the fines until the other questions were settled; he held therefore that it was unnecessary to tender the fines, and that the tender in 1814, with a view to the suit, did not weaken the lessee's case.

(1) He required fines on all the lives, as he was not aware that they had been paid on the two first, but this was corrected by the parties.

10. Lord Lyndhurst thought that the objection that the lessee had encroached on the lessor's lands, and had thereby occasioned the delay, and ought not to be allowed to take advantage of his own wrong, did not bear upon the case, as the landlord might have renewed without prejudice to the questions of encroachment and breach of covenant. It would not be safe to infer from this that a lessor is bound to renew until his just claims against his tenant are adjusted and satisfied, for he who seeks equity must do equity. The decree, which was affirmed, it will be observed, was without prejudice to any action which Trant might bring for breach of covenant, so that it was a decree for a specific execution, subject to the right of the lessor to recover for breach of covenant. But the original order of the Court of Exchequer proves that no such decree would have been made but for the lessor's own default. That order removed the difficulties in Trant's way in bringing the action. When the action abated, Lord Lyndhurst observed that nothing could be done in respect of the action without an application to the Court to put the then party upon terms. For two years and a half Trant neglected to make such application, and it was too late for him to find fault with the decree on that ground.

11. The decisions of the House of Lords to which we have referred appear to have put a proper construction upon the statute passed in favour of the tenantry in Ireland, whereas the decrees which were overruled do not appear to have been warranted by the Act, and would if left in force have operated against the body whom they seemed to protect; for forbearance must have had some limit, and mere neglect would by length of time and circumstances have become wilful neglect, whilst the tenantry of Ireland would have been led to believe that what they deemed the old equity—a right to delay the renewal of their leases as long as they pleased—still continued, and would thus have been exposed ultimately to the loss of their right to renew. Now, on the one hand, no advantage can be taken by the landlord of mere neglect—he must be active and put the tenant on

his guard — and on the other, the tenant cannot after demand evade his legal obligation to renew without delay, if he insist upon his right of renewal, nor can he insist upon that right at all if his conduct in delaying the renewal amount to fraud.

12. Upon another statute in Ireland (*k*), giving to landlords facilities for recovering their property for non-payment of rent, it was held that a recovery in ejectment by a lessor for non-payment of rent against a tenant for life of a lease for lives renewable for ever was binding against those in remainder, although they were infants, the saving in the statute of the rights of infants, &c., not extending to those entitled in remainder only (*l*), but now the saving in the statute of Anne is repealed (*m*).

13. Where under the Irish Act of 4 Geo. 1, c. 5, s. 3, a tenant filed his bill on the last day but one (a Saturday) of the six months allowed him by the statute after a recovery in ejectment by his lessor, and ought to have deposited the rent and costs in court on that day or the next, and one of the Judges of the court (none being in Dublin) on that day, at his house four miles from town, made an order, dated on that day, for the lodging of the money in the bank, and the order was left on the same day with the Accountant-general after the bank was closed, and on Monday the money was paid into the bank:—The Court made an order that the lodging of the money should be entered as on the Saturday, and that the Accountant-general should grant a certificate accordingly, which he did. Upon an appeal to the House of Lords, the order was reversed, because it concluded the whole question, and upon the evidence it was not clear that the money was ready on the Saturday (*n*). The propriety of this decision was manifested by what followed, for ultimately the tenant's bill was dismissed with costs, as it did not appear

(*k*) 11 Ann, c. 2, Ir.

(*l*) Baker v. Morgan, 2 Dow, 526.

(*m*) 56 Geo. 3, c, 88, s. 14.

(*n*) Vesey v. Bodkin, 4 Bligh, N. S. 64; 1 Dow, N. S. 456.

that he was prepared with the money on either the Saturday or Sunday. It was said that if he had the money on the Saturday, and had been prevented from lodging it by a fatality, a different case would have been presented (*o*). If the tenant had the money on Saturday he ought to have tendered the amount either then or on the Sunday to the landlord's attorney (*p*).

14. In Delany *v.* Shackleton, one bill of the tenant had been dismissed, the plaintiff not appearing, and some years afterwards another bill was filed by his assignees, on the ground that there were open accounts between the lessor and lessee, and that a year's rent was not due when the ejectment was brought, and that the proceedings were fraudulent. Lord Manners, C., dismissed the bill with costs. Upon an appeal to the House of Lords, it was insisted in the reasons for the respondent that the statute of George the First contemplated not only the case of a tenant actually in arrear, but one who may have conscientious grounds for disputing the justice of his landlord's demands, and therefore permits him, in lieu of payment, the lodgment of the sum claimed with the officer of the Court, subject to its disposal, and it was submitted that it could not be in the power of a court of equity to dispense with the tenant's performance of the conditions of relief imposed upon him by that statute, which contains a direct enactment that equity shall not relieve him unless he previously performs them. No payment was made into court. The alleged fraud was denied (I).

15. In O'Reilly *v.* Fetherston (*q*), a question arose which

(*o*) See 3 Dru. & War. 269.
(*p*) 1 Jo. 139.
(*q*) 4 Bligh, N. S. 161; 2 Dow & Cla. 39.

(I) This is stated from my printed cases. I held a brief for the respondent. I have not any judgment marked on it, nor can I find any. My notes show that the case was intended to be argued. In the Lords' Journals, 8 May 1827, upon the Report from the Lords' Committee on cases depending on which prints had not been delivered, on the respondent's petition the appeal was dismissed, with 50*l.* costs. I have the appellant's printed case and appendix.

depended upon the Irish Acts before referred to, and upon the later Irish statute of 8 Geo. 1, c. 2, s. 4, a lessee mortgaged his leasehold interest, and the landlord recovered against him in ejectment for non-payment of rent. The six months allowed by the statutes to the lessee elapsed, and he took no step, but before the lapse of nine months the mortgagee made a proper tender, and filed his bill and lodged the money, and obtained a decree for a redemption from the Court of Exchequer in Ireland, and the mortgagee then assigned the leasehold interest to a trustee for the head landlord, who paid him off. Upon a bill filed by the lessee's representatives (I), it was decreed, in effect, that she was entitled to the benefit of the last decree, upon the ground that although the lessee had allowed the six months to pass without redeeming, yet that the mortgagee was entitled to redeem within the next three months, and that if he did redeem, the redemption enured to restore the equity of redemption in the lessee, and upon an appeal to the House of Lords this decree was affirmed upon the motion of Lord Lyndhurst, C., and not it appears against the opinion of Lord Redesdale, who died before judgment was given, and with the concurrence of Lord Manners (II). It was a case of

(I) The facts are complicated, in consequence of other transactions. The agreement of 1819 by Francis Fetherston, the son, stated in 4 Bligh, N. S. 179, 180, not to claim any right of redemption in the leaseholds, was not put in issue. The bill mentioned in the text was filed by Sarah Fetherston, as administratrix of Francis Fetherston, the father, who was one of the executors of Johnson, the assignee of the leaseholds. Jane Camelford was administratrix of Johnson, and was a defendant.

(II) According to my note, Mr. Horne, for the appellant, insisted that after the recovery in ejectment the landlord's title was good against the tenant.—"*Lord Chancellor:* Lease continues in lessee bound in covenants to lessor [that is, I suppose, in mortgagee, to whom it had been assigned].—*Horne:* No; the lease is for ever extinguished. I do not consider it as a continuing lease.—*Lord Manners:* The lessor takes the equity of redemption, and becomes subject to the debt.—*Horne:* The lessee is barred of all remedy in law and equity.—*Lord Manners:* Upon what principle can lessee who has mortgaged his estate have a better remedy than a man who has not?—*Horne:* I do not deny the existence of the lease in the mortgagee, but the

great nicety and difficulty. It was insisted at the bar by the appellant's counsel, that the Acts transferred the equity of redemption from the lessee to the landlord. Lord Lyndhurst's view appears to be the true one (I).

16. In Malone *v.* Geraghty (*r*), it was held to be clear by Sir E. Sugden, C., that an equitable mortgagee could, under the statutes, maintain a bill for redemption, but it having been insisted that this was contrary to the rule as settled in Ireland, the case was reheard, but the Court remained of the same opinion, and upon an appeal to the House of Lords his decree, which fixed the landlord with the costs as he rendered the suit necessary, was affirmed with costs, upon the motion of Lord Cottenham, C., and with the concurrence of Lord Brougham, without calling upon the respondent's counsel.

(*r*) 3 Dru. & War. 239; 1 H. of L. Cas. 81.

tenant cannot claim through him. I give the mortgagee all his rights when he has taken his principal, interest, and costs; the land is the lessor's.—*Lord Chancellor:* Suppose the converse of this case; then equity of redemption remains." The following is an outline of the argument for the respondents. The question is whether the lessee is barred when the mortgagee recovers. The Act does not say that mortgagee shall hold against his mortgagor; it merely deals *with the lessor's interest*, 1st, against the lessee; 2dly, against the mortgagee. It does not disturb their interests *as between themselves*. It treats the right of a mortgagee as such. If the mortgagee acquires the equity of redemption, 1st, Are infants, &c. barred (as if the mortgage were made under a power in a settlement)? 2. Is the debt extinguished as between the mortgagor and the mortgagee? and the consequences of deciding thus affirmatively were shown. 3. Or is it in the election of the mortgagee? If so, a new contract would be created. The rule of equity forbids a mortgagee to acquire a new lease for his own benefit. Here the mortgagee acquiesced in the decree of 1817, which left him as mortgagee, and he assigned the decree, and therefore cannot now repudiate the decree.

(I) Redemption unsettles nothing; disturbs nothing; it simply restores everything. Per Cur. 3 Dru. & War. 247.

CHAPTER V.

OF MORTGAGES.

SECTION I.

OF MORTGAGES.

1. *Where a lease by the mortgagor to the mortgagee is invalid.*
2. *Mortgage to a solicitor* pendente lite *to secure past and future advances and costs.*
3. *Solicitor must prove advances by other evidence than the securities.*
4. *Mortgage and release of mortgagor, the latter confined to debts intended to be released.*
5. *Mortgage by father and son, tenant for life and in remainder, for father, son to be indemnified out of father's assets.*
6. *Voluntary settlement void against mortgagee, although parties were tenants in tail in remainder under a previous settlement.*
7. *Absolute assignment for nominal consideration maintained as a security for* 1,500 *l. and interest.*

1. WHERE a further mortgage was executed in fee in January 1734, for 800 *l.* in the whole, and in May following the mortgagor conveyed the estate in fee to a third person, who was really a trustee for the mortgagee, at the yearly rent of 80 *l.*, a bill filed to set aside the lease was dismissed on the ground of length of time and acquiescence. Upon an appeal to the House of Lords, the decree was upon the same grounds affirmed, upon the advice of Lord Eldon, C., and Lord Redesdale. But Lord Eldon said that a transaction of this sort ought certainly to be looked at with a great deal of jealousy, and a court of equity regarded such transactions with a great deal of jealousy, *though if they should appear to be perfectly clear, it would not set them aside merely because they were foolish.* Lord Redesdale went much further: he said that the only principle was this, that

although a mortgagee might, without imputation, contract for the purchase or release of the equity of redemption, no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease), where the mortgage continues, ought to stand, if impeached within a reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction. If he purchases the equity of redemption there can be no objection. But the mortgagor holding it still, and the property being reduced in value to a fee-farm rent, so that by the incumbrance on the reversion he is disabled from redeeming so well as if that had not been done, and he being liable to have a bill of foreclosure filed against him, the expenses of which he must pay, and to an action for the mortgage money, such a transaction ought not to stand (*a*).

2. In Daly *v.* Kelly (*b*), in which it is to be regretted that the parties were twice sent back to the court below, Lord Manners decided that a mortgage from the plaintiff in a suit to establish his title as devisee, after a verdict in his favour, but before the suit was concluded, for past advances and costs, and also for future advances and costs, was valid. Upon an appeal to the House of Lords the point was not decided, but Lord Eldon said that the security was of a nature which courts of justice looked at with great jealousy. Suppose, he said, for a moment that the attorney had a right to this security on the land for past and future costs, the security must at least be regarded with a great deal of jealousy, because when an attorney has such a security, there may not be so much caution in the expenses as would otherwise be applied. The decree, we may observe, went further than the authorities warrant as to future costs (*c*); but the circumstance that the security extended to them

(*a*) Hickes *v.* Cooke, 4 Dow, 16; see Morony *v.* O'Dea, 1 Ball & Beat. 109.

(*b*) 4 Dow, 417.

(*c*) Jones *v.* Tripp, Jac. 322; Uppington *v.* Buller, 2 Dru. & War. 188, 189; Pitcher *v.* Rigby, 9 Price, 79.

would not affect it in other respects (*d*). It was a great stretch of jurisdiction to hold that an attorney could not, pending the suit, take a security for future costs.

3. In the case of Morgan *v.* Lewes (*e*), which it is impossible to refer to without regretting that the litigation had not been stopped at an earlier period, it was held that Morgan, having taken securities from Lewes, whose adviser, solicitor, and agent he was, for various sums of money, was bound to prove the advances by other evidence than the securities themselves or the accounts, and also that an attorney and agent is bound to keep regular accounts. The first rule was laid down generally, but in other passages it was qualified. Lord Redesdale said that the settled accounts confuted themselves, *so* that they could not presume that any sums were advanced except such as appeared to have been so by receipts and evidence independent of the instruments (*f*), and Lord Eldon, C., concluded by repeating that the record appeared to him to open and establish this principle, that where an attorney takes it upon him to take securities from his client *which do not express the real nature of the transaction* (I), it is incumbent on him by other evidence than the securities themselves to prove what was the real nature of the transaction and what sums were really advanced.

4. If a mortgage upon the true view of all the dealings between the parties was not intended to be a substitution for securities for a like sum otherwise previously secured by the mortgagor to the mortgagee, it will not be held to have that operation; and if a deed of release, contrary to the intention, by general words would release the debtor from the former debt, yet equity would control it

(*d*) Williams *v.* Pigott, Jac. 598.

(*e*) 5 Price, 32; 4 Dow, 29; 3 You. & Jerv. 230. Morgan *v.* Evans, 8 Bligh, N. S. 777; 3 Cla. & Fin. 159. See Lawless *v.* Mansfield, 1 Dru. & War. 537.

(*f*) See the judgment in 5 Price, 142, 143.

(I) In this passage in 5 Price, 143, the rule is stated without qualification.

and not allow it to defeat the right of the creditor; and if the former debt has been subsequently paid, equity, notwithstanding the legal operation of the release, would not permit the debtor to recover one shilling of the money already paid (*g*).

5. Where a father tenant for life and a son tenant in fee in remainder joined in a mortgage in fee for a sum of money borrowed by the father for his own use, Lord Eldon, C., observed that in such a transaction the consequence generally in equity would be that the son joining in a mortgage of the inheritance would be considered as a creditor on the real and personal assets of the father to the amount of the mortgage, and might call upon the mortgagee to make use of it against the real and personal assets of his father, to work out his relief (*h*). And the decree of the Lords accordingly provided that the son should be considered in equity as a creditor generally on the assets, real and personal, of the father (who was dead) for the mortgage money and interest paid by him; and also that as to so much of the money as had been applied in discharge of debts and incumbrances affecting the real estates of the father which had descended to the son, the son was entitled to stand in the place of the persons who were respectively entitled to such debts and incumbrances, according to their respective priorities.

6. A mortgage will prevail over a prior voluntary settlement on collaterals by a tenant in tail after a recovery, although the collaterals were under the uses barred by the recovery tenants in tail in remainder of the estates. The case in which this was decided has already been stated (*i*).

7. Where absolute assignments of leasehold estates were made by a woman to a creditor of her son-in-law for 10 *l.* consideration, and with common deed stamps, but it

(*g*) Noel *v.* Rochfort, 4 Cla. & Fin. 167; 10 Bligh, N. S. 483.
(*h*) Lord Rosse *v.* Sterling, 4 Dow, 442.
(*i*) Cormick *v.* Trapuud, 6 Dow, 60; *supra*, p. 148.

appeared by parol evidence and by leases granted by both parties, that the deeds were to be a security for 1,500 *l.*, the balance of debt due from the son-in-law, upon which interest had been paid for many years, the lady remaining in possession of the leaseholds, upon a bill filed to be relieved against the assignments as having been obtained by undue influence and without consideration, the Master of the Rolls (*k*) observed that the deeds were a valid security for 1,500 *l.* and interest, and upon an appeal to the House of Lords that decree was, upon the motion of Lord Cottenham, C., and with the concurrence of Lord Brougham, affirmed. The Lord Chancellor said that it was argued that as the original assignment appeared to be without consideration, there was a presumption of a resulting trust, which could not be repelled by parol testimony. That was a misapprehension of the law of the case. It was alleged also that the lady executed the deed without advice, and under improper influence; but to support these allegations there was an absence of all evidence, and such things were not to be presumed, especially under circumstances of long acquiescence and lapse of time, nor ought an issue in such a case to be directed to try whether the assignment was made for the purposes alleged. It would be dangerous and unjust to commit such a case to a trial at law, all the witnesses being dead (*l*).

(*k*) Lord Cottenham.

(*l*) Gordon *v.* Selby, 11 Bligh, N. S. 351.

SECTION II.

OF THE EQUITY OF REDEMPTION.

1. *Of the wife's estate, where altered.*
2. *New Statute of Limitations. Cholmondeley* v. *Clinton, old law; adverse possession of an equitable estate.*
3. *Blake* v. *Foster.*
4. *Page* v. *Linwood; distinct characters of mortgagee and lessee; account without rests.*
5. *Case remitted, with liberty for appellant to apply for rehearing.*
6. *Thorneycroft* v. *Crockett; right of second mortgagee of a share to redeem first mortgagee of the whole.*

1. We have already fully reviewed the cases in which the right of a wife to the equity of redemption of her estate remains unaffected by an inaccurate reservation of the right to redeem (*a*).

2. The new Statute of Limitations, which places equitable rights upon the same footing with legal ones, and provides expressly within what period a mortgage may be redeemed (*b*), has rendered some important decisions in the Lords, upon the effect of adverse possessions as between equitable claimants, of little value. But we must shortly notice the great case of Cholmondeley *v.* Clinton (*c*), where it was determined, upon the advice of Lord Eldon, C., and Lord Redesdale, that in a question not between mortgagor and mortgagee, but between two persons claiming the equity of redemption, and claiming both of them adversely to the mortgagee, an adverse possession by one of the claimants for 20 years was a bar in a court

(*a*) *Supra*, p. 172.

(*b*) 3 & 4 Will. 4, c. 27, s. 26, 28; see 2 Sugd. Purch. 613.

(*c*) 4 Bligh, O. S. 1, 101, 105, 117 [only one part published]; and see Whalley v. Whalley, 3 Bligh, 1, as to time running in equity when the alleged fraud was discovered; and see now s. 26 of the 3 & 4 Will. 4, c. 27. See also Kelly *v.* Bateman, 2 Bligh, N. S. 327, but no rule of law was involved in it.

of equity—for the adverse possession of an equity of redemption for 20 years was a bar to any other person claiming that equity of redemption, and it was an adverse possession which produced the same effect as abatement, intrusion, and disseisin, which belonged to legal estates. This reversed the decree of Sir W. Grant, who held that whilst the equity of redemption subsisted, the question to whom it belonged must remain open, and therefore mere possession without title would not give any person a right to redeem (*d*).

3. The case of Blake *v.* Foster (*e*), which involved the question of a right to impeach a sale under a foreclosure suit by a remainder-man, under the will of the mortgagor, was ultimately decided upon the grounds of compromise, acquiescence, neglects, and length of time.

4. Where a mortgagee for 3,000 *l.* of a house was a party to a contract for rebuilding it, by which it was agreed between her (Miss Linwood) and the owner and the builder that a lease of the whole of the new building should be granted by all parties to the builder, and he should grant an underlease to the mortgagee of part of the buildings, at 250 *l.* a year, and she was to pay 1,000 *l.* besides, by four half-yearly instalments, commencing the 24th June 1827, without interest, which was part of a plan to pay him for the new building. Delays arose in consequence of disputes whether the works were or not well executed. The mortgagee took possession of the part intended for her, but did not pay the 250 *l.* rent or the 1,000 *l.*, nor did she receive interest on the 3,000 *l.* mortgage. Upon a bill filed by the builder, he obtained a decree for the execution of the lease

(*d*) 2 Mer. 173; see 2 Sugd. Purch. 612.

(*e*) 2 Ball & Beat. 565; 4 Bligh, O. S. 140; Beat. 461; Printed Cas. D. P. 1823, and Printed Cases, 1825. In the respondent's case in the latter appeal the facts and proceedings are succinctly stated. And see Meade *v.* Lord Bandon, 2 Dow, 268, a case of alleged tender and non-payment of principal or interest for 24 years, yet decree of foreclosure, although no demand; and see Webb *v.* Preston, Printed Cases, D. P. 1824, where time was a bar to the relief; Lord Rancliffe *v.* Parkyns, 6 Dow, 149.

to him, and he was then to execute to the mortgagee a lease according to the contract, at a rent of 250 *l.*, and she was to pay the 1,000 *l.* and interest at four per cent., according to an agreement in 1808 (subsequently to the original contract). An account was accordingly ordered to be taken of what was due for principal and interest and what for rent, and of what was due to her for principal and interest in respect of her mortgage. And it being alleged by the plaintiff and Miss Linwood, that it had been agreed that he should become the assignee of her mortgage, consequential directions were given. It was afterwards ordered that these accounts should be taken against Miss Linwood with half-yearly rests, treating her as a mortgagee in possession, but this latter order was discharged by Lord Brougham, C., and upon an appeal to the House of Lords against his order, the order was affirmed, upon the motion of Lord Cottenham, C., who thought that Miss Linwood could not properly be considered as a mortgagee in possession, as the rent which the builder had to receive was not the money of the owner of the equity of redemption, and he thought that the agreement for the transfer of the mortgage did not alter the relative situation of the parties (*f*).

5. In Waldron *v.* Kelly, where a surety by bond and judgment for a sum which with other sums was secured by mortgage by the principal was relieved against the creditor, who had realized the mortgage on the ground that the assignees of another party who was liable and had become bankrupt, had been ordered to pay into court a dividend, which would have discharged the residue of the debt, but which the creditor allowed to remain unpaid, although subsequently treated by the Court as if it had been paid into court—the House of Lords made a singular decree, and which affords a bad precedent, viz., the cause was remitted back, and the appellant was to be at liberty to apply for a rehearing, but if such application should not be made within

(*f*) Page *v.* Linwood, 4 Russ. 6; 2 Russ. & Myl. 214; 4 Cla. & Fin. 399.

six months, the Court was to be at liberty to proceed on the decree as if the cause had been affirmed by the House (*g*).

6. A point of some nicety, upon the right of a second mortgagee of a share of the estate to redeem a prior mortgagee of the whole without redeeming a subsequent mortgage to the same person of the other shares of the estate, was decided in the late case of Thorneycroft *v.* Crockett, where the bill for a foreclosure was filed by the mortgagee claiming the first and third mortgages (*h*). The first mortgage was made in 1821 by Henry Crockett to Legge & Company, of the whole of the freehold estate for 1,000 years, to secure 6,500 *l.* and interest. Henry Crockett was a trustee for his brother John of two-thirds of the estate, and the money raised was divided between them accordingly. This mortgage in 1826 was duly transferred to Thomas Baldwin, but the money was then reduced to 6,000 *l.* In 1831 Henry Crockett conveyed his one-third of the estate to trustees in fee, to secure 12,000 *l.* Henry Crockett died intestate, leaving his brother Robert his heir. In 1833 Robert, as such heir, and John Crockett and his son (who claimed under him) mortgaged John's two-third parts of the estate to Attwood & Company (subject to the mortgage for 1,000 years), in fee, for securing a sum of upwards of 2,000 *l.* and interest. On the 16th of January 1838, Attwood & Company transferred this mortgage (subject to the first mortgage) to Thorneycroft, in fee, and on the 18th of the same month of January, Baldwin transferred his mortgage for 1,000 years to Thorneycroft. The term of 1,000 years thus as to the two-thirds of the estate so conveyed to Thorneycroft in fee became merged in the inheritance. Thorneycroft, therefore, stood as first mortgagee of the one-third of Henry Crockett for 1,000 years, and subject to the mortgage this one-third was made a security for the 12,000 *l.* Thorneycroft was, as mortgagee, seised in fee of the other two-thirds to secure the

(*g*) Waldson *v.* Kelly, Printed Cas. D. P. 1824.
(*h*) Printed Cases, D. P. 1848.

first and third mortgages, and it should be borne in mind that the mortgage for the 12,000 *l.* did not affect these two-thirds. Thorneycroft filed a bill of foreclosure, but made no *general* case for tacking. He, however, contended that he was entitled to tack the mortgage for 2,000 *l.* to the mortgage debt for 6,000 *l.*, and that the persons claiming the security for the 12,000 *l.* were not entitled to redeem without paying off both sums: they contended that they were entitled to redeem the mortgage of 6,000 *l.*, as the only security prior to their own, and so it was decreed by Sir L. Shadwell, Vice Chancellor. Upon an appeal to the House of Lords, the appellant, Thorneycroft, insisted that the respondents, whose charge extended only over one-third of the estate, ought not to be allowed to redeem the first mortgage, which comprised the entirety, without redeeming also the appellant's second mortgage. The respondents insisted by their reasons that no case for tacking was made out against them, and that their mortgage security, although only of one-third of the estates, was made by the same mortgagor under the same title as the first mortgage, and as the first mortgagee might have insisted that the second mortgagee could not compel him to allow a redemption of one-third of the first mortgage, so the decree properly not only authorized, but compelled the respondents to redeem the whole mortgage of 1821, and then authorized the appellant to redeem the respondent's on payment of what should be due in respect of the 6,000 *l.* and interest and the 12,000 *l.* and interest, and the appellant was not entitled, in respect of his mortgage of 1833, to redeem any part of the mortgage securities that might so become vested in the respondents, without paying off the whole of what might be found due to them in respect of the two preceding mortgages. This view was adopted by the House, and accordingly the appeal was dismissed and the decree affirmed with costs.

CHAPTER VI.

OF PURCHASES.

SECTION I.

OF THE RIGHTS AND LIABILITIES OF PURCHASERS.

1. *Inadequacy of consideration: purchase by uncle of nephew.*
2. *Mixed consideration of natural love and money valid.*
3. *Purchase of lease for debt and advance, with right to repay: void contract against son just of age joining with father without consideration: false statement of consideration.*
5. *Sale in satisfaction of debt sustained, subject to an account.*
6. *Purchaser entitled to compensation for misdescription; benefits to him beyond the contract taken into account.*
7. *White* v. *Cuddon: compensation for misdescribing fines as arbitrary: specific performance although sale a breach of trust.*
8. *Reversed: "in this particular" construed "in these particulars," in conditions of sale.*
9. *Upon the right to compensation for misdescription of fines.*
10. *No specific performance with compensation where it would make the sale a breach of trust.*
11. *Upon the right to a specific performance without compensation.*
12. *Small* v. *Attwood, what misrepresentation will enable a purchaser to rescind the contract.*
13. *Observations on the rule.*
14. *The case of Small* v. *Attwood shortly stated.*
15. *Heads of Lord Lyndhurst's judgment.*
16. *His view of the question of confirmation and of the knowledge of the parties: six months' possession, with knowledge of misrepresentation, binding.*
17. *Observations thereon.*
18. *Decree reversed on appeal.*
19. *The case considered as a precedent.*
20. *Vigers* v. *Pike accordingly.*
21. *Gibson* v. *d'Este, purchase set aside because right of way not communicated.*
22. *Statements in bill and answer.*
23. *Evidence.*
24. *Vice Chancellor's opinion.*
25. *Decree reversed.*
26. *Opinion of the Lord Chancellor.*
27. *Of Lord Brougham.*
28. *Of Lord Campbell.*
29. *Observations thereon.*
30. *The rule of law considered.*
31. *Edwards* v. *M'Leay.*
32. *The case stated.*
33. *And compared with Gibson* v. *d'Este.*
34. *Legge* v. *Croker, relied upon in D. P.: the case stated.*
35. *Distinction between the cases.*
36. *Harris* v. *Kemble, specific performance refused: misrepresentation by seller of terms of a lease.*

37. *Brookman* v. *Rothschild, relief against pretended sales and purchases of stock, bonds, &c.*

38. *Security for bonus on a contract by an uncertificated bankrupt in the name of a third person.*

39. *Champernown* v. *Brooke: interest or allowance for dropping or wearing of lives: terms of contract not to be added to.*

40. *Interim proceedings in the case.*

41. *Claim by third person to the benefit of a purchase in the name of a trustee for another.*

42. *Whether a seller can, after the conveyance to the purchaser, impeach a lease.*

43. *Sale subject to an annuity generally, which was charged on other estates also, purchaser only to contribute.*

44. *Joy* v. *Birch; compliance with a power to repurchase an annuity.*

45. *Waiver of contract after decree for performance of it.*

46. *Plea of purchaser for valuable consideration without notice.*

47. *Right of purchaser of part of an annuity against the claim of creditors to retain it to satisfy surplus rents received by the seller.*

48. *Vendor's lien.*

49. *Sale of presentation valid, although incumbent* in extremis.

1. MERE inadequacy of consideration is no ground to impeach a sale, where there is no fraud. In Merediths *v.* Saunders (*a*), an uncle obtained a bargain in purchases from and through his nephew, which were concluded by conveyances: the nephew afterwards refused to perform a covenant to renew upon the allegations that he had acted from the opinion entertained by himself and others that the uncle —being supposed not to be likely to marry—would make him his heir, and it was in evidence that the uncle had made such a declaration, but the uncle did marry, and put the estate into settlement, and the nephew did not then impeach the transaction. The Court of Exchequer in Ireland decreed a specific performance, and that decree was affirmed upon an appeal to the House of Lords on the motion of Lord Eldon, C.

2. A *bonâ fide* consideration of natural love and affection may, although accompanied by a pecuniary consideration, which in itself would be grosssly inadequate, support a conveyance. A reversion descended to Samuel Whalley subject to a life estate, he devised the reversion to his nephew Daniel, and he afterwards joined with the tenant for

(*a*) 2 Dow, 514.

life in selling a portion of the estate: he was 83 years of age, and the tenant for life was 54 years of age. Samuel sold the reversion of the rest of the estate to Daniel for two life annuities, one to himself and the other to his nominee, which Daniel secured according to the agreement, and Samuel by a deed, in which Daniel was described as the son of Daniel's brother, and which recited the contract and the security for the annuities, in consideration of the annuities, and of natural love and affection for Daniel, conveyed the freeholds, and covenanted to surrender the copyholds to him, and afterwards surrendered the latter accordingly. After a long delay, Samuel's real representative filed a bill to impeach the transaction. It was admitted by Daniel that the reversion was worth 3,000 *l.*, and an actuary proved that the annuities were worth 389 *l.* 14 *s.* The bill was dismissed by Sir W. Grant, Master of the Rolls, and his decree was affirmed upon an appeal to the House of Lords on the motion of Lord Eldon, C., and with the concurrence of Lord Redesdale (*b*). Lord Eldon said that at the date of the will the old man had the intention of giving the property to his nephew. The mode of selling for annuities was not impolitic for a man of 81, expecting a reversion subject to a life of 54; and he had in fact joined with the tenant for life in selling part of the property: he could not therefore be ignorant of his right and power to sell, nor entirely so of the value. The deed *primâ facie* was a grant, not only for a money consideration, but for love and affection. It was open to proof that love and affection formed no part of the consideration; upon such proof it would be considered as a mere money bargain. It was urged that the want of recital afforded presumptive proof, but the deed in the description of the parties showed the relationship. In Filmer *v.* Gott, 4 Bro. P. C. 230, if he had heard the case in the Court below, he should have decided

(*b*) Whalley *v.* Whalley, 3 Bligh, 1; 1 Mer. 436. See Macniell *v.* Cahill, *supra*, p. 96; Moore *v.* Crofton, 3 Jo. & Lat. 438.

without directing an issue, upon the ground that the answer did not set up the consideration of blood. In this case the nephew by answer insisted that the grant was made upon the consideration of love as well as money, and his oath must prevail in the absence of proof to the contrary.

3. In Shortt *v.* Firman (*c*) it appeared that Firman was tenant for life, with remainder to his son in tail, of the property in question (together with other estates). This property was subject to a lease made 60 years ago, which then depended on one old life, subject to a rent of 13 *s.* 6 *d.* an acre, which lease was vested in William Shortt. Shortt had advanced at various times to Firman small sums, which amounted altogether to 640 *l.* and a fraction. Firman's son was in the army, and came of age in November 1797, and on the 18th of the following January (1798) he joined with his father in an agreement in writing, whereby, after reciting that in consideration of 1,000 *l.* to them in hand paid, they agreed to execute a lease of the property unto Mr. Shortt for the term, at the rent, and under the covenants in the lease mentioned, it was agreed that in case the Firmans, their heirs, or assigns, should at any time before the expiration of five years pay to Shortt, his executors, &c., the said sum of 1,000 *l.*, with interest from the day of the date thereof, then the lease to be executed should become null. And it was agreed that in case the lease should become void, the Firmans would execute a lease of the property to Shortt for three lives, with a covenant to add one more upon the dropping of the first life, at the yearly rent of 1 *l.* 1 *s.* 4 *d.* an acre, with the like covenants; and Shortt was to remain in possession under the first lease at the rent thereby reserved until the new lease should be granted. By a deed in May 1798 the Firmans covenanted to levy a fine (which was levied accordingly) to confirm the lease to be executed, and subject thereto, to enure to themselves. No lease was ever executed under this agreement, nor does

(*c*) Printed Cas. D. P. 1824.

it appear that any draft was prepared. The rent was to be the old one, 13 *s.* 6 *d.* per acre. The bill alleged that it was to be a lease for ever; this the answer denied, and stated that it was to be for three lives and one in reversion. No money was paid at the execution of the agreement, but Shortt gave to *the elder Firman* an I. O. U. for the balance of the 1,000 *l.* beyond the 640 *l.*, which was afterwards paid. There were subsequent dealings and sales between the two Firmans and Shortt, and ultimately they filed a bill against him to set aside all the transactions. Lord Manners, C., dismissed the bill as far as it sought to impeach the deeds, but upon a rehearing he varied the decree by declaring the agreement of January 1798 to be fraudulent and void, and he directed inquiries with reference to a subsequent sale. Upon an appeal to the House of Lords the decree was affirmed as far as regarded the agreement of 1798, but special directions were added as to the operation of the two decrees in other respects, upon which no point arises. The proceedings were left in a state of great confusion.

4. This case was open to no serious doubt. The consideration was an inadequate one, and the alleged payment of the 1,000 *l.* was a false statement. The son had but just attained 21 and had no consideration. The Firmans contended that the transaction was usurious.

5. In a case which we have before considered fully on other points (*d*), a purchase for an alleged debt was supported, although the question whether the seller was indebted to the amount remained still to be settled. A son who became entitled to an estate under a settlement on his father's death, and who was subject to a large amount of debt claimed by his brother-in-law under the deceased father, and to whom the brother-in-law advanced the sum of 200 *l.* on his bond and warrant of attorney, in consideration of 3,500 *l.*, part of the alleged debts, conveyed the

(*d*) Macneill v. Cahill, 2 Bligh, 228; *supra*, p. 96.

estate to his brother-in-law absolutely. A bill filed to set aside this purchase was dismissed with costs by Lord Manners, C. Upon an appeal to the House of Lords, it was shown by Lord Redesdale that the accounts could not stand. He said that the bill impeached the transaction of the sale itself, but not on sufficient ground, supposing the purchase-money to have been, as alleged, a debt from the son to the father. Assuming the account to be correct, or the consideration actually paid, the transaction was proper and fair. By the judgment of the House an account was directed to be taken between the parties, and it was declared that there were not sufficient grounds for impeaching the sale; but it being admitted that the purchase-money was not paid, except by setting it off, but for which no discharge was then given by the purchaser to the seller, the latter ought to be deemed to have a lien on the estate for the purchase-money, and the purchaser ought to be deemed a debtor to the seller for so much of the purchase-money, if any, as would not at the time of the purchase have been satisfied by the just demands of the purchaser against the seller (I).

6. If a contract stipulate that any error or misdescription shall be the subject of compensation, still the whole of the description should be taken into consideration, so as to see whether the purchaser, if he have not the subject as described, has not obtained in other respects greater advantages than were held out to him; and where compensation ought, according to the general rule, to be given, yet it cannot, unless the error from the nature of it admit of a value being put upon it. If the error be made by trustees, and would, with compensation, make the sale amount to a clear breach of trust, the purchaser will be left to his remedy at law.

7. All these points were decided, or at least laid down, in

(I) The son became insolvent, and the brother-in-law was his assignee. A compromise of the debt, making a provision for the son and his wife, and for the assignee's debt only, was set aside on grounds of public policy.

the case of White *v.* Cuddon (*e*). The sellers there were trustees for sale. The estate was sold by auction. The particulars of sale in the front page or heading stated that the fines in the manor were arbitrary, and this had been stated in previous public advertisements. Lot 1 was described as a manor with quit-rents, fines, courts baron, waste lands, &c.; and it was stated that the profits of the manor, after deducting court expenses, had been, on an average of the last eight years, about 150*l.* a year. One of the conditions of sale was, that if through any mistake the said lots, or either of them, shall be improperly described, or any error or misstatement be made *in this particular*, such error or misstatement shall not vitiate the sale, but the vendor or purchaser, as the case may happen, shall pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way. The usual agreement was executed by the purchaser and the agent of the sellers. It afterwards appeared, that in cases of descent, or of a widow's estate, only one year's quit-rent was payable; on the other hand, it also appeared that the average profits of the manor, stated as 150*l.* for the last eight years, was the average for the last 30 years, and that the average of the last eight years somewhat exceeded 200*l.* a year. The trustees had acted with great want of care, and a letter was produced by the plaintiff to fix them with knowledge of the nature of the fines (which had been produced under an order to produce documents) from the steward of the manor to the managing trustee, in which he stated that the customs of the manor were rather singular and unusual, but, perhaps, it would be better to let the purchaser find them out. On an admission of an heir at law no fine was due to the lord, and only an heriot of 5*s.* on alienation: the fines in general were at the lord's will. The purchaser rejected an offer, made without prejudice, of 80*l.* for compensation, or to rescind the contract. The purchaser filed his bill, and

(*e*) 8 Cla. & Fin. 766; 4 You. & Coll. 25, *nom.* Cudden *v.* Cartwright.

prayed for a specific performance, and for a compensation for the misrepresentation, which was accordingly decreed by Lord Abinger, C. B.: he considered it part of the contract that compensation should be made, but he added, that when it was considered that it was the property of *cestuique* trust, and the trustees were the vendors, he did not know that the purchaser was entirely safe, or whether they might not file a bill to get compensation from him, but he gave no opinion on that. These grounds could not sustain the decree, for undoubtedly equity ought not to have enforced the contract, unless the Court deemed the contract such as the *cestuisque* trust ought fairly to be bound by, for after the decree they could not set aside the contract, and if the purchaser ought to have allowed a compensation on his part—if that was the meaning of the Court—that should have been enforced in this suit, for he who seeks equity must do equity.

8. Upon an appeal to the House of Lords the decree was, upon the advice of Lord Brougham, Lord Cottenham, and Lord Campbell, reversed, but the purchaser applying for a specific performance at the sum bid, and the trustees not objecting, a specific performance was decreed, the purchaser paying the costs of the suit to that time. Upon the appeal several important questions were raised, viz., 1. Whether the misstatement in the particulars fell at all within the condition. 2. If it did, whether the purchaser was entitled to compensation. 3. Whether specific performance could be decreed with a compensation. 4. Whether it could be decreed at all. The first question turned upon the circumstances that the statement as to the fines being arbitrary was in the particulars, and the condition provided compensation if through any mistake the lots, or either of them, should be improperly described, or any error or misstatement be made "in this particular." Lord Brougham said that it was not very clear that "in this particular" might not mean "in this respect," but he inclined to think that they might take

the words as applying to the particulars which follow. Lord Cottenham assumed this to be the correct view, but as he thought the result would be the same either way, he considered it not material to discuss that point. Lord Campbell, whose view appears to be the true one (and the point is an important one, as the expression, however incorrect, is frequently used), was clearly of opinion that the statement in the title-page of the particulars that the fines were arbitrary, was part of the contract between the parties, in the same manner as if it had been repeated in the description of the lot. The property was bought according to the description of it in the document, which in the condition of sale is called "this particular," and the vendors were bound by any statement respecting the property contained in any part of the particular. The statement in the title-page as to fines was the same as if it had been "the fines mentioned in the first lot are arbitrary," and it could not be rejected, because it was not afterwards repeated.

9. Upon the second question, viz., the right to compensation, considering the statement as to fines as embodied in the condition, Lord Brougham thought that, even if they assumed that such an error as the difference between fines arbitrary and certain was entitled to be compensated, it seemed quite clear that *the value of the manor* was the matter in question, and that there was no such misdescription as would entitle the purchaser to compensation, provided the yearly value had not been overstated—nor did he very well see how the Master could, by any kind of inquiry, satisfy himself as to the amount of compensation; that was to be measured merely by the difference between arbitrary or fixed fines. Lord Cottenham said, that as the purchaser had a knowledge of the income of the estate for the last 30 years, it must be immaterial to him whether the fines were arbitrary or not, and that the real object of compensation was the loss which the purchaser might sustain from the arbitrary fines not being afterwards improved by the improvement in the

value of the property. Now, by what scale or rule, he asked, was the Master to ascertain how far the estate was less valuable than it would have been if the fines had been arbitrary, arising from the circumstance of the possibility or probability of the estate improving in value? possibly the estate might diminish in value, and then the difference would be in another direction. In more cases than one it had been considered as a fatal objection to a decree for compensation when you cannot ascertain what the compensation should be. Lord Campbell thought that in respect of the fines payable on the admission of the customary heir, there was likewise a breach of the condition. Perhaps under the condition the purchaser might have claimed a compensation, and might have been entitled to a specific performance subject to such compensation. The effect of the whole statement was, that the profits amounted to 150 *l.* a year from arbitrary fines. But the purchaser discarded the representation on which he purchased, that the annual profits amounted to 150 *l.*, and he sought a compensation equal to the difference between the value of the manor, supposing the heir to be admitted on the payment of one year's quit-rent, and the widow to make a nominal payment for her freebench—and what the value would be if every customary heir and every widow were on admission to pay to the lord two years' improved value of the tenement. The decree made no reference to the annual value stated in the particulars, and made no distinction between the fines on the admission of the heir and the widow—for he considered that the representation could not be understood to extend to fines on the admission of widows to their freebench—therefore if the vendors had been acting in their own right and selling their own property, he was of opinion that the decree could not be supported. This, again, appears to be the true view of this case. The condition applied as well to the purchaser as the seller, and although under such a condition, a seller having the means of knowledge would not be allowed to state that the estate

produced 150 *l.* a year, and then claim a compensation because it really produced 200 *l.* a year, yet where under such a condition a compensation is sought against the seller, in consequence of a partial misrepresentation against the interest of the purchaser, the latter cannot refuse to take into the account the benefit which he has obtained beyond that which was represented as sold. The particulars and conditions and agreement form but one contract, and that is to be executed specifically, if at all, according to equity and good conscience. As to the question of difficulty in ascertaining the amount of compensation, it is not required in such cases that there should be an exact equivalent, and the doctrine of compensation has been applied to cases infinitely more difficult to manage than this (*f*). That was not the real objection to the decree.

10. Upon the third question, viz. whether a specific performance could be decreed with a compensation, the law Lords were agreed that it could not. The trustees were considered to have been guilty of a breach of trust, and Mortlock *v.* Buller (*g*) was relied upon against the relief. It was represented by the purchaser as a sale by trustees of a manor, which they misrepresented, and which by the evidence it was shown they had the means at least of accurately representing, they entering also, as a part of that contract, into a stipulation that compensation should be made for the consequences of that misrepresentation, and in that way the purchaser had proved a case which would put him out of court.

(*f*) Dale *v.* Lister, 16 Ves. 7, cited; Milligan *v.* Cooke, 16 Ves. 1; Hanbury *v.* Litchfield, 2 Myl. & Kee. 629. See Baker *v.* Bent, 1 Russ. & Myl. 224; Sherwood *v.* Robins, 1 Mood. & Malk. 194.

(*g*) 10 Ves. 292. In 1814 Lord Eldon, C., observed in the House of Lords that he perceived the judgment in the case of Mortlock *v.* Buller had been questioned in a decision of the then Lord Chancellor of Ireland. He had since looked into all the circumstances of the case, and with all due respect for that opinion, if he were to decide the case again he should decide it exactly in the same way as before; 2 Dow, 518; and see Sugd. Purch, 241, n.

11. Upon the fourth question, whether the purchaser was entitled to a specific performance without any compensation, Lord Cottenham said it was unnecessary to consider how far, if it had been resisted, such a decree would have been made upon the record as it stood. He only mentioned that to guard against its being supposed that if it had been resisted the House would have thought it competent to make a decree of that kind. He concluded that the bill [as filed] must have been dismissed with costs, and therefore although a decree was consented to, he thought the purchaser ought to pay the costs, and Lord Campbell said he thought that the bill ought to have been dismissed with costs, and Lord Brougham guarded the House against having given any kind of opinion as to what would have been the consequence if the specifie performance had been contested. There was therefore no decision upon this point: had it called for a decision, it may be doubted whether the House ought not to have decreed a specific performance without compensation, if the purchaser desired it. He sought a specific performance with an additional benefit, but the Court might well grant him the execution of the contract, although not with the addition which he asked. It is clear that the purchaser might have enforced a specific execution without compensation if his bill had been framed in that view, and the frame of the bill, where the plaintiff modified his demand, did not render it imperative on the Court to dismiss it, and certainly not with costs. Costs no doubt are in the discretion of the Court, but although it is proper not to enforce a contract by trustees which amounts to a breach of trust, because of the injury which it would inflict on the *cestuique* trust, yet where trustees have carelessly or from ill motives entered into a deliberate contract, which the Court out of mercy to the *cestuique* trust will not enforce, that is no reason why the trustees should have their costs against the purchaser; and in this case the letter which they received from the steward was entitled to

weight on the question of costs. If trustees in such a case were left to pay their own costs, they could not recover them from their *cestuique* trust unless they could show that they had acted with such caution as is required from trustees in the sale of trust estates; and here if the trustees had so acted, the purchaser would have been entitled to what he prayed for, subject to the true construction of the contract.

12. In the great case of Small *v.* Attwood (*h*), the grounds upon which a purchaser is allowed to maintain an action of deceit for damages, or a bill in equity to rescind the contract on the ground of misrepresentations out of the written contract, were agreed to by all, but upon the application of the rule to the conduct of vendors and purchasers, directly opposite views were taken. It will be proper to state the law of the case, and then to present the reader with such a general view of the merits of the case as may enable him to apply it as a precedent. It was laid down by Lord Lyndhurst, C. B., in deciding the case, that as far as the cases of law go, where a misrepresentation of a material fact not within the observation of the opposite party is made, the person making the representation, knowing at the time that his statements are untrue, under such circumstances an action may be maintained at law for the purpose of recovering a compensation in damages for the injury the party has sustained, notwithstanding the contract was in writing, and notwithstanding those particulars may be no part of the terms of the written contract. If that be so, he added, it would follow also that in a court of equity a party would be entitled to come forward for the purpose of obtaining redress in order to get rid of a contract founded on such fraudulent misrepresentations (*i*). This was adopted in the House of Lords by Lord Devon (*k*), who justly observed, with reference to Lord Eldon's observation in Edwards *v.* M'Leay, 2 Swanst. 289, that he was not apprised of any

(*h*) 6 Cla. & Fin. 232; You. 407. (*i*) You. 461, 462.
(*k*) 6 Cla. & Fin. 330.

similar decision, that we may find an additional reason for the principle that nothing but the most clear and decisive proof of fraudulent representation, made under such circumstances as show that the contract was based upon them—such a case indeed as Lord Eldon, in his experience, had not known to occur—would justify the interference of a court of equity. Lord Cottenham, C., did not dissent from the rule, and Lord Lyndhurst repeated that he considered the law to be clearly settled, that where representations are made with respect to the nature and character of the property which is to become the subject of purchase, affecting the value of that property, and those representations turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised, and in a court of equity a foundation is laid for setting aside the contract, which was founded on a fraudulent basis (*l*). Lord Brougham stated the rule in the same way (*m*), and added that the three circumstances must combine, first, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and thirdly and chiefly, in his view of the case, that it should be this false representation which gave rise to the contracting of the other party. After discussing the cases, he added, that the inference he drew from them was this, that general fraudulent conduct signified nothing, that general dishonesty of purpose signified nothing, that attempts to overreach went for nothing, that an intention and design to deceive might go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, could be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general inten-

(*l*) 6 Cla. & Fin. 395. (*m*) Ibid. 444.

tion to overreach were enough, he hardly knew a contract even between persons of very strict morality that could stand: they generally found the case to be that there had been an attempt of the one party to overreach the other, and of the other to overreach the first; but that did not make void the contract. The party must not only have been minded to overreach, but he must actually have overreached. Lord Wynford (*n*) said that he could not quite agree with Lord Brougham that in order to set the contract aside the parties must appear to have been induced *entirely* to enter into it by false representations. He (Lord Wynford) said, if the parties were induced fraudulently in any way, although they might have other reasons for entering into the contract, if the strong grounds which prevailed on them to enter into the contract were fraudulent representations, that would give an action in a court of law for deceit, and that he should hope would be considered as a sufficient ground in a court of equity to set aside such contract.

13. To the rule of law, as qualified and explained in the House of Lords, no exception can be taken. There is no part of the jurisdiction of a court of equity which requires to be executed with more caution than that of rescinding a contract. This we shall see powerfully exemplified in this very case of Small *v.* Attwood. If there be fraud, the remedy is clear of difficulty. But the Court ought to be quite sure of the grounds upon which it decides, for by rescinding the contract it may do irreparable damage to one party, whilst by refusing to interfere it does not deprive the other party of his remedy by an action of deceit, if he really have been deceived. Lord Loughborough observed (*o*) at law, that it was not necessary to cite any case to prove the proposition that parol evidence of a parol communication between the parties ought not to be received to add a term not inserted in the specific agreement which they had executed, and for this plain reason, that what passed between

(*n*) 6 Cla. & Fin. 502. (*o*) Haynes *v.* Hare, 1 H. Blackst. 664.

them in that communication might have been altered and shifted in a variety of ways, but what they signed and sealed was finally settled. It would destroy all trust, it would destroy all security, and lay it open, unless the parties were completely bound by what they had signed and sealed; and Gibbs, J., in another case (*p*), observed that the parties came to an understanding and reduced the contract to writing. By that alone they were afterwards to be bound, unless some fraud could be shown. Even if there had been a representation it would not have availed. He held that if a man brought him a horse and made any representations whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortened and corrected the representations, and whatever terms were not contained in the contract did not bind the seller, and must be struck out of the case. His ground at *nisi prius* was, that after the written contract was made, parol evidence could not be admitted of former representations, unless there was proof of fraud, that is, of some fraud by which the sellers prevented the purchasers from discovering a fault which they knew to exist. These, we may observe, are sound principles, and the absence of precedents in courts of equity, upon which Lord Eldon remarked, is a convincing proof of the opinion of the Profession that nothing short of fraud could be made the foundation of a decree to rescind a contract upon the ground of misrepresentation where the written contract is open to no impeachment, and all the documents of title have been furnished. Lord Eldon, in Mortlock *v.* Buller (*q*), drew the clear distinction between refusing to perform the contract at the demand of a party and ordering that contract to be delivered up.

14. We may now consider the case itself of Attwood *v.* Small in its general bearings. Attwood was the owner of certain iron works, and Small and others represented The

(*p*) Pickering *v.* Dowson, 4 Taunt. 779. (*q*) 10 Ves. 308.

British Iron Company. A proposal having been made to the company to sell the works, James, who was Attwood's agent, and P. Taylor, who was the founder of the company and a large shareholder, and afterwards manager and agent of the works, went down to view them in May 1825, whilst Attwood was there. Upon P. Taylor's report three of the directors wrote to Attwood, on the 6th June, a proposal to buy the property for 600,000 *l.* payable by instalments. This proposal was made, they said, under a complete understanding that he would afford P. Taylor every facility to ascertain the correctness of the representations that had been made to him respecting this property: should the facts not fully confirm what they had heard in any essential point the offer was not to be binding. On the 10th June a regular agreement was executed between three of the directors, as individuals, and Attwood for the sale of the property at 600,000 *l.*; 25,000 *l.* down, 200,000 *l.* on the 1st October, and the property to be conveyed to trustees to secure the residue of the money and interest, and then for the purchasers; the title was to be made out within one month; the remaining purchase money was to be paid by instalments, the last of which was to be paid on the 15th October 1827. In this agreement there was no stipulation whatever as to the yields, or as to the price of any ingredient necessary to the manufacture of pig iron. The directors made a report to their company of the purchase in August, in which they stated that the treaty was concluded after the nature and capacity of the works had been fully investigated. In that month P. Taylor and another director went to the works and examined them, and in September P. Taylor went there to reside as manager, and sent favourable reports to the company, and pointed out the good connexion which they had obtained. The title not being ready by the day fixed, a new agreement was prepared, by which the last instalment was to be retained as a security for the title [which ultimately became unnecessary, as certain missing deeds were found], but although the pur-

chasers were ready to pay the 25,000 *l.* and the 200,000 *l.*, Attwood refused to sign the agreement, because one of the parties was to execute by attorney, and was described as a director. This led to disputes, and the agreement was not executed. On the 12th October P. Taylor wrote from the works to the directors, and stated that he had no reason for any change of opinion respecting the value and desirableness of the property to the company. The facts which had recently come under his observation bore out the representations made by Attwood. On the 13th one of the purchasers communicated to P. Taylor the intelligence that they meant to give notice to rescind the contract if the sale was not completed on the 1st November, and that it would be unmanly and uncandid not to state that not only the world out of doors entertained an idea that they had given too high a price, but that many of their directors entertained the same idea, and he and another of the purchasers were tainted with the same statement. The next day the abstracts were returned with a notice that if a title should not be made by the 31st a bill would be filed. On the 20th October the purchasers proposed to proceed with the contract if Attwood would waive their personal liability, to which he assented; they then proposed, as a new term, that a deputation should go to the works to ascertain whether certain data given to P. Taylor by Attwood were correct: this also was assented to, and on the 27th the deputation went down assisted by several scientific persons. The price of iron was falling, and "the share market was in complete dismay as to all schemes whatever." The deputation on their way back to town wrote certain queries to P. Taylor, who immediately (31st October) replied to them, and speaking favourably of the result of examining Attwood's books as far as he had gone, concluded that although it would not be safe or prudent to estimate profits upon the close calculations which Attwood had recently exhibited to confirm the statements he made at the time of his agreement for

the sale of his property, still that these appeared to him unquestionably to prove that the data which he gave to them at the time were more favourable to the buyer than the seller. The deputation reported to the directors on the 3d November that having, with every diligence and attention of which they were capable, examined the books and other documents submitted to them by Mr. Attwood, they had come to the conclusion that in a comparison with the paper, which purported to contain the principles and calculations on which the negotiation was originally founded, Attwood had substantially redeemed the pledge he had given of proving that the information upon which the managing directors concluded their contract with him was correct, and well founded. The scientific persons sent down also made a favourable statement. The directors then relied upon a letter from Lord Dudley, relating to a renewal of a part of the premises having been lost by Attwood, and claimed an abatement (but which the evidence showed was not the true ground); the result was an offer by the purchasers to renew the contract upon an abatement of 50,000 *l.*, this Attwood conceded, and on the 4th November an agreement (which it occupied three days to settle with the conveyancing counsel) was executed. It was endorsed on the second agreement, and recited that since the latter was prepared, it had *for divers good causes* been agreed to vary and alter the same in manner therein mentioned. It then proceeded to release the three purchasers from their personal liability, except that they were to remain liable to the payment of interest on the remaining instalments, and the estates were to be conveyed to trustees as within expressed; and it provided that 50,000 *l.* only was to be paid on the 15th April next, the other 50,000 *l.* having been agreed to be abated. The two agreements were executed on that day, and 225,000 *l.* paid to Attwood, and on the 9th possession was delivered up by Attwood of the works, and the trade was carried on by the company. The money market

became unsettled, and the purchasers being unable to pay the instalments, obtained time from Attwood in several instances as a favour, and then after a notice to rescind the contract, on the 12th May 1826 they, with P. Taylor as a co-plaintiff, on the 27th June filed a bill against Attwood, and against James and Edwards, to have the contract rescinded. The ground laid for relief was false statements in papers furnished by Attwood [in point of fact, the particulars were written down by P. Taylor as the negotiation proceeded, but Attwood admitted them] to prove his statements as to the actual cost of making iron at the time of the original contract, and James and Edwards were both charged as having been in fraudulent collusion with Attwood, and the bill also charged fraudulent misrepresentations to the deputation, and fraudulent concealment of faults in the mine, and other matters. Attwood by his answer denied the frauds and misrepresentations, and said that the representations made by him were upon certain assumptions, and were general averages. It would be useless to attempt to explain this part of the case. James and Edwards by their answers denied fraud, misrepresentation, or collusion. The plaintiffs then amended their bill by striking out P. Taylor as a plaintiff, and making him a defendant, charging him with knowledge and with collusion with Attwood in consequence of loans from Attwood to him; and Taylor's brother, who declined to continue a plaintiff, was also made a defendant. P. Taylor and Attwood both denied fraud and collusion, and as the loans were not considered as making out a case against P. Taylor, it is unnecessary to observe further upon that charge. It certainly required a strong case, and well made out, to rescind the contract under such circumstances. Attwood was deprived of the testimony of James and Edwards by their being made defendants, and the company had worked the mines and used the property just as they pleased. Their objects were to unite this with other properties as one great con-

cern, to procure a connexion, and to drive other coal proprietors out of the market: the value of iron had fallen very low.

15. The Lord Chief Baron, in an elaborate judgment, dismissed the bill against P. Taylor, fixing Attwood with his costs, and rescinded the contract, on the ground of misrepresentations amounting to fraud, with costs. He was of opinion that there were misstatements in the paper in question, which the deputation went down to verify, which were known to be such by Attwood, and that the statements were meant to represent the actual cost of pig-iron at that time, in the month of June, at the furnaces, and that the misstatement was to a large amount, and that there was a misstatement also as to the cost of converting iron; and that Attwood's defence, that it never was intended to represent the cost of making iron or converting iron at that time, and that the statements were on certain assumptions, was not made out. The learned judge placed reliance upon a conversation which passed at the dinner with the deputation after they had made their examination. And he was of opinion that the representation made by Attwood that there were no yield accounts, was not a correct representation, if credit was to be given to the testimony of the witnesses. All these circumstances brought him to the conclusion that there were misstatements of matters of fact, material and important in the negotiation that was going on to regulate the price that was to be paid for this property, and they were misstatements within the knowledge of the party, Mr. Attwood, by whom they were made. The Chief Baron also came to the conclusion that James and Edwards had acted in collusion with Attwood, and therefore in effect rejected their evidence as witnesses, which had been read *de bene esse*. He summed up what he had stated thus: there was a misstatement of the basis of the agreement: there was a misstatement with the knowledge of the party, and therefore it would come within the principle which he had

stated, and to which we have already referred, unless anything which had occurred subsequently to the period when those representations were made was to deprive the plaintiffs of their right to take advantage of those misstatements. He thought that the value of the mine had been proved to be greatly indeed below 600,000*l.*, but that alone was not a ground on which the contract could be set aside, although it was some evidence to show that the representations made with respect to the productive power and character of the mine were fallacious.

16. Lord Lyndhurst then proceeded to consider the question of confirmation, upon which I may observe the counsel of the defendant laid great stress. After a minute examination of the evidence, he came to the conclusion that the case against P. Taylor was not established, although, as Attwood must have been aware of the misstatements which he had made, it was incorrect on his part to endeavour by pecuniary accommodation to entangle the superintendent of the works, the only member of the company who was placed in a situation likely to detect the errors in the statements which he had made. The Chief Baron then observed, that the argument for Attwood was, that P. Taylor was the agent of the plaintiffs, and that his previous knowledge and possession, from the 9th November to the filing of the bill, must have made known to him all the misrepresentations, and that the six months' delay was fatal. Applying this to an alleged fault in the mine, the learned Judge considered that P. Taylor, immediately after he took possession as agent and partner, must have known of the circumstances connected with the fault. All the workmen, or nearly all, were continued. Everything that was known to Attwood must have been known to P. Taylor of necessity immediately after he took possession: it was quite clear that he knew of the fault. He thought, under those circumstances, supposing P. Taylor to be the fair and honest agent of the company, it was too late, at the expiration of six months, to

turn round and say, upon that ground, that this bill might be filed for setting aside the contract (I). But Lord Lyndhurst held that P. Taylor could not be considered as having discovered the misstatements as to the cost of making and converting iron, &c.: it did not appear that he had any opportunity, or that he had any knowledge whatever of any particular facts upon which he could build the conclusion that deception had been practised on him. He considered that the company had not affected their rights by the indulgence which they sought, nor by their alteration of the works, cutting down trees, and the like, because the whole was incident to the act of Attwood, and being put into possession as owners, they acted as such until they discovered that they had been imposed upon. The sale was rescinded by the decree, and Attwood was directed to pay the costs of the suit.

17. In the luminous judgment, the heads of which are now before us, sufficient consideration was hardly given to the effect of the second and third contracts, executed at the same time, and with the abatement of 50,000 *l.* The pretence put forward for demanding that abatement was proved not to be true ground, and the company had chosen to state that it was generally "for divers good causes," it ought therefore perhaps to have been held to extend to every cause. With the means of knowledge which the company possessed, and the inquiries which they had made, they were not satisfied, but sent down a deputation, accompanied by several persons of skill, to examine for themselves: the report was perfectly satisfactory, but yet with a lurking suspicion that they had got a bad bargain, they exacted an abatement of 50,000 *l.* Surely that was in the nature of liquidated damages, and really amounted to this: we have been examining and inquiring, and still are not satisfied, although we have discovered nothing on which we can

(I) This was of course so considered by the House of Lords.

raise a complaint; strike off 1-12th of this large price, and we will execute a new contract, and complete the purchase without difficulty. If there ever was a case in which previous representations ought to have been considered as put an end to by the execution of a solemn contract, it was this. The representations as to cost were ambiguous at all events, and no positive fraud was proved against Attwood, but he was sadly crippled in his defence by the manner in which the company had framed and altered the pleadings. The Court might well have held, that if after all that had taken place the company, with the abatement of 50,000 *l.*, meant to reserve to themselves the right to further investigate the representations made by Attwood, they should have expressly reserved that right to themselves by the new contracts which they were about to execute, instead of providing only for their own personal release, and for the safety of the title. They made Attwood rely principally upon the estate for the future payments, and to that extent he would himself suffer if his representations proved to be incorrect. With this the purchasers were satisfied. Besides, the ambiguity in the paper representing the statements of Attwood *was their own act*, for P. Taylor made out the paper, and if he had understood the statements to refer to costs, at the particular period he ought to have so stated them. When the Lord Chief Baron dismissed the bill against P. Taylor, and yet set aside the contract, the suit stood in a singular predicament. For the original bill was founded upon an allegation that Attwood's misrepresentations had misled everybody. But the company being aware from Attwood's answer that knowledge would be brought home to P. Taylor of that of which they said they were ignorant, they made him a defendant in order to evade the consequences of his knowledge, and charged him with fraud (I); and they accord-

(I) The charges of fraud, which do not appear by the reports, were numerous. The statement and charge was, that soon after the treaty P. Taylor was

ingly contended that as P. Taylor was acting in concert with Attwood, no knowledge which he possessed at an early period with respect to the incorrectness of the represen-

induced to fraudulently collude with Attwood. As instances of his collusion it was charged that, 1, he induced the directors to execute the contract of June 1825; 2, to renew the contract in November 1825; 3, he prevented them from discovering the fraud. In a later portion of the bill P. Taylor was charged with accepting bribes from Attwood, and it was charged that he assisted in the fraud, and in performance of the fraudulent agreement advised the directors to purchase, and stated, contrary to his knowledge, that the paper of representations was correct, and stated falsely that the costs in the statement exceeded those in the books. The whole of his conduct after the contract was represented to be fraudulent, step by step: his letters were quoted, and it was stated that he knew the statements were false; that the representations which he made appeared to be false from Attwood's books, which he (P. Taylor) had examined. Sometimes the bill charged P. Taylor pretended he had not examined the books, which was false, as appeared by his letter of the 30th October: that P. Taylor opposed the reduction of price [and so did J. Taylor], and that after he obtained possession he continued to act fraudulently; he concealed the fault which he had discovered, and his letters were written in collusion with Attwood, and a letter of 29th December 1825 was written to deceive and stop inquiry, which would have exposed Attwood's frauds: that when the deputation were at the works P. Taylor gave them no information of the frauds he had discovered, and that he knew the real cost at the works, and concealed it. The bill finally charged that the company were not bound by P. Taylor's account, and that his misrepresentations were evidence of Attwood's frauds, and that the directors were not bound by their reports, or by admissions or statements prior to the discovery of fraud. These statements fixed the plaintiffs with the consequences of P. Taylor's knowledge, stripped of all fraud, as the decree in effect declared. Best, a witness who proved the exclamations and observations which were the principal evidence of fraudulent intention against Attwood, and who was credited by Lord Lyndhurst, was the only witness against P. Taylor, and he swore that upon an intended visit of the directors to the works in the spring of 1826, to discover grounds for impeaching the contract, he asked P. Taylor what he would do when they came, to which Taylor replied that he would bow them out, and send them away as wise as they came. Lord Lyndhurst came to the conclusion that there had been some mistake or misapprehension with respect to this conversation; You. 496–498. Lord Brougham came to the conclusion that this affected Best's credit generally; 6 Cla. & Fin. 476, 477. It is difficult to believe that there could have been any mistake as to such a remarkable conversation, supporting as it did the plaintiff's case, and being of the same character with the observations of other parties on other occasions to which his testimony related.

tations which were made could affect them (*r*). When P. Taylor was absolved from the charge made against him, and the bill was dismissed against him, the foundation of the amended bill was much shaken, if not destroyed. The Court grappled with this difficulty, and held upon the evidence that P. Taylor was not aware of the principal mis-statements. When this case was in the House of Lords Lord Lyndhurst said that his judgment as to the failure of proof against P. Taylor, which was admitted to be correct, would not be correct if P. Taylor had been apprised of the frauds, and had not communicated them to his principals. Then it was said, the moment the bill was dismissed as against P. Taylor, he must be considered precisely in the same situation as if he was a plaintiff. Granted. But suppose he had been a plaintiff, and it had been proved that he knew of the fraud, would that have been any objection to the decree?—None whatever. It did not appear to him therefore that there was anything in the shape of the record that was at all intricate or entangled (*s*). I am not sure that I am aware of the view which Lord Lyndhurst took of this question. The force of the fact that knowledge was by the bill alleged on the part of P. Taylor, and fraud was averred against him to counteract the effect of that knowledge was, that when the allegation of fraud was held not to be proved, the knowledge remained in the partner and agent unaffected by fraud on his part, and that impressed the representations which were alleged to be fraudulent with an innocent character as regarded him, although still they might not be correct statements, and his knowledge would bind his co-partners. But if P. Taylor had been continued a co-plaintiff in a bill which charged him with knowledge of all the alleged misrepresentations, it would have been found difficult consistently with the rules

(*r*) You. 492.

(*s*) 6 Cla. & Fin. 432, 433; see Lord Brougham's observations on this point, ib. 467.

of equity to have made a decree in favour of him and his co-partners (I).

18. From the decree rescinding the contract there was an appeal to the House of Lords. Lord Cottenham, C., Lord Devon, and Lord Brougham carried the reversal of the decree, and the bill was dismissed with costs. Lord Lyndhurst in a graceful and eloquent speech maintained his original views, and Lord Wynford, who stated that he had only given a limited attention to the case, was of opinion that an issue should be directed to try the question of fraud. Lord Devon held that there was no proof sufficiently clear and strong to fix Attwood with any definite statement of facts so as to found thereupon a charge of fraud and misrepresentation, and that the purchasers did not rely upon the statements made to them, and investigated for themselves. In regard to the alleged misrepresentations to the deputation, he held that the purchasers had within their call the means of ascertaining the truth or falsehood of the statement, and not having applied themselves with ordinary prudence to do this, they could not then, especially after such a lapse of time, throw themselves upon a court of equity for protection. The question, he said, was not as to waiver or acquiescence in fraud, but whether the parties had used that ordinary degree of vigilance and circumspection in order to protect themselves which the law has a right to expect from those who apply for its aid. Lord Cottenham, C., considered it dangerous to rely upon parol evidence of conversations in the absence of evidence on the part of Attwood: he relied upon the documents and what passed in writing. He was of opinion that the representations were *not* intended to show the cost at the particular

(I) The decree was followed by an injunction upon a supplemental bill, restraining the transfer of the stock in which Mr. Attwood had invested the 200,000 *l.*, and which he had transferred to his mother; You. 507. From this decree also there was an appeal, which it of course became unnecessary to prosecute. See Sugd. Purch. 281, 282.

period, but the average result of former years. The first point was, whether the representations were matters of fact or only speculative calculations of the future; secondly, whether those representations, whatever they were, were acted upon by the company; thirdly, whether they were true or false; and lastly, whether anything had happened to deprive the company of the right of insisting upon any inaccuracies in those representations. He came to the conclusion, after an elaborate review of the evidence, that the purchasers considered the papers as calculations founded on averages for the time past of the cost of the particular process referred to, and not of the actual expense of a particular period; secondly, that they did not rely on any representation of Attwood, but had free access to all the books they required, and satisfied themselves of the accuracy of the representations; and thirdly, that with full knowledge of all the facts complained of they for many months acted upon the contract, and induced Attwood to give them time for payment. He did not find the fact of fraud made out. Lord Brougham, in tracing the evidence, came to the conclusion that the directors engaged in the transaction and the deputation by themselves and their agents, investigated the accounts, and the books, and the works, and that the result was favourable, as appeared particularly by P. Taylor's communication. Still fraud was not absolutely impossible, but it would require that it should be as clear as noonday in its circumstances to enable the party either to recover damages at law in such a case for the deceit, or to obtain relief from this contract so made, in equity. It must at all events be perfectly clear; there must be no doubt whatever; it must not be on a nice calculation, nor on a balance of evidence; it must not be on such calculations as might have deceived the party himself, so that he might have been mistaken. It must be clear incontestible proof, as, for instances, books proved to be kept back which would have altered the case; as fabricated accounts brought

forward which gave it a false colour; as falsehoods told and shown to be untrue in point of fact, and untrue to the knowledge of the person making them. Lord Brougham justly observed upon the imperfect information given by the bill of some of the principal charges. He came to the same conclusion as the Lord Chancellor upon the alleged misrepresentation that the paper was an estimate after the dead work was performed, and he concluded by stating, that when the principles to which we have before referred were applied to this case, they found the facts were wanting; they found there was no misrepresentation which gave rise to the contract; that the purchasers did not rely upon the representation, but inquired for themselves, as he showed at large. Such being the fact, even if no observation arose as to the delay, as to the adoption and affirmance of the contract, purging it of all objections which might be made, and supposing that they had come in time instead of delaying so many months, he was bound to say that the parties had not a right to be released from their contract by the interposition of a court of equity.

19. Thus was this case concluded as far as regards the main question (*t*), after an extent of litigation which, having regard to the judicial time which it occupied, and the expense it occasioned to both parties, has never been surpassed. I thought at one time, from its complicated facts, that it could hardly perhaps be cited as an authority for anything beyond the general principle (*u*), but I felt bound to put the reader in possession of a general view of the case, and my present calm review of it has satisfied me that it is a precedent of much importance. It affords an excellent commentary on the rule of law, and exemplifies the process by which we are to arrive at a just conclusion. The opposite views taken of the particular evidence is not important, but the principles by which the House of Lords was guided are

(*t*) For subsequent proceedings see 3 You. & Coll. 105, 501; 6 Cla. & Fin. 523; Sugd. Purch. 279–282.

(*u*) Sugd. Purch. 268.

indeed important. Previously to this case the instances were rare in which a purchaser, on the ground of misrepresentations prior to a written contract which was silent on that head, and after inquiry and with means of knowledge and possession, had applied to a court of equity to rescind the contract. If the decree had remained undisturbed, followed as it was by an injunction operating on the funded property into which the purchase money had been invested, no doubt many such experiments would have been made. But the decision of the Lords placed the doctrine on the right foundation. Fraud is a sufficient ground for relief, but it is not to be made out from ambiguous papers, where the parties investigated the books and accounts and inquired for themselves, and with possession and full means of knowledge delayed for some months to apply for relief. Indeed, it is manifest that the same conclusion would have been arrived at, if the application had been made at an earlier period. The danger of resting upon such evidence as was produced in this case to impeach the written contract, is proved by the opposite views of the very learned persons who gave judicial opinions upon the force and effect of it; but the Lords in effect decided that where there are ample means of forming a judgment from written papers and correspondence, much credit is not to be attached to alleged conversations and exclamations, particularly if they are not distinctly charged in the bill, so as to enable the other party to meet them.

20. This case was followed by that of Vigers *v.* Pike (*x*), which, as far as we need deal with it, was the case of a bill to enforce payment of the residue of the purchase money for a lease of mines to a company, upon which they had entered and worked the mines for three years, and a cross bill by the company to be relieved from the lease in a certain qualified way. The ground of the cross bill was that the lessor and the lessee (who in effect was the company) joined in misrepresentations and a fraud on the shareholders. Lord Plun-

(*x*) 8 Cla. & Fin. 562; 2 Dru. & Walsh, 1.

ket, C., made a decree in the original bill, and dismissed the cross bill, and upon an appeal to the House of Lords, the decree was affirmed, upon the motion of Lord Cottenham, C., and with the concurrence of Lord Brougham and of Lord Devon, upon the merits. The Lord Chancellor was of opinion that the alleged ground of fraud on the shareholders could not sustain the cross bill: the only question was whether the facts proved entitled the company as such to the relief prayed. He referred to the marked distinction between what was necessary to resist a suit for specific performance of a contract, and what was necessary to support a suit to set aside a deed executed and an arrangement completed. One ground urged was that the lease was not binding on the company, because the terms were not according to the previous written contract. The facts failed him, but if the facts had been made out he would have had to show that the company were not competent to vary the terms, and that the accepting the deed as it stood, and acting under it in the enjoyment and actual consumption of the property from that time, ought to have no effect in precluding them from their raising such a case for relief. The Lord Chancellor concluded by observing, that in a case depending upon alleged misrepresentations as to the nature and value of the thing purchased, the defendant cannot adduce more conclusive evidence or raise a more effectual bar to the plaintiff's case, than by showing that the plaintiff was from the beginning cognizant of all the matters complained of, or after full information concerning them continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines.

21. In the important case of Gibson *v.* d'Este, the decree in the court below was reversed in the House of Lords (*y*). The question was, whether a purchaser was entitled to re-

(*y*) 2 You. & Coll. N. S. 542, where the reader is referred to the judgment for the facts; Printed Cas. D. P. 1848; shorthand writer's notes of the speeches.

scind a contract executed by conveyance and payment of the purchase money, in consequence of a concealment, or rather of an omission to state to the purchaser the existence of a right of way over a portion of the frontage to the mansion purchased. Lady Augusta de Ameland was the owner of Mount Albion House, at Ramsgate, and of lands surrounding it, which she purchased at different times, and which, till she enclosed them, were open and unenclosed. There was a right of way, called the Liberty-way, which passed over the lands in front of the house—a sort of cart road, not defined or limited. There was a park-paling in front of the house, and the Liberty-way ran between the house and the paling, and Lady de Ameland complained of the nuisance to which she was subject from this way being open in front of her house. The parish perambulated the boundaries through the grounds of Mount Albion estate in 1820. In the early part of that year Lady de Ameland applied to the vestry for leave to inclose the part of the way leading in front of the house, which she obtained, and in March 1820 Lady de Ameland executed a deed by which, in performance of the conditions imposed on her by the parish, she declared that the enclosure was by virtue of the consent of the vestry alone, and she disclaimed all right to enclose, except by such consent, and that the way should be re-opened, and the enclosure removed, on seven days' notice; and that she would, during such enclosure, form and maintain another road in a different direction, and that the part of the way to be enclosed should be marked out by proper mark-stones, and that the parish authorities might twice, or oftener, in every year survey the said mark-stones, and that she would pay the yearly rent of 5*s.* as an acknowledgment, in moieties to the surveyors of the parish of St. Lawrence and the town of Ramsgate. In consequence of this consent, so much of the Liberty-way as passed through the lands was wholly stopped up in the year 1820 by a pale-fence, and became inaccessible to the public. Very soon afterwards

three mark-stones were placed, supposed to be in the centre of the Liberty-way, so as to mark the direction of it, and those stones showed the division of the liberty of Ramsgate from the parish of St. Lawrence: these stones were placed at different intervals between the north-west side of the estate and the cliff; upon the south-west side of the stones the letters T. R. [town of Ramsgate] were engraved. The stones were all outside the above pale-fence. Lady Augusta, shortly before her death in 1830, conveyed her Ramsgate property to her daughter Mademoiselle d'Este in fee. The substituted road was kept open and regularly used, and the 5*s.* rent was regularly paid by Lady Augusta till the conveyance, and afterwards by her daughter till 1838. These payments were made by Mr. Wightwick, solicitor, as their agent, who was present at the vestry meeting in 1820: he, of course, knew for what the payment was made, and it was regularly inserted in his accounts with his principals. This was the state of things in 1838, when Mademoiselle d'Este determined to sell the estate in lots for building purposes. A person of the name of Allason was employed to parcel out the property, and set out roads, which he accordingly did. Mr. Wightwick told him of the claim of the parish to the way, and that the line claimed across the estate was marked by stones. This person, in his deposition, for both he and Wightwick were examined as witnesses in the cause, said that Wightwick added, that he did not believe that the parish could establish their claim to the right of way across the property: he found the stones, and he came to the conclusion that the right of way, if any such existed, passed in the direction and on the south-west side of the stones: he was not aware of the deed of 1820, or that Lady Augusta or Mademoiselle d'Este had admitted the existence of the right of way: he planned, amongst other things, a road, called Victoria-road, and that that road should cover and comprise the line which he concluded to be the line claimed by the parish, and it was

made in a line with, and close up to, and wholly on the south-west side of the stones. This mistake left two or three feet of the way on the north-east side of the stones out of the new road; considering the way to have been about six feet wide, and the stones to have been placed about the centre of it, and, consequently, to the extent of about two or three feet in breadth along the south-west side of the land in front of the mansion-house, where there was not much frontage, the way still would pass. If the surveyor had been aware of the facts, he would, he said, have thrown these additional feet into the Victoria-road; and he thought that the house, &c., would not on that account have fetched a less price. As it was, the two or three feet were comprised in a lot which was described as the mansion, with grounds, &c., containing about 1 A. 2 R. 23 P., and the purchaser was to enclose the lot, which he accordingly did, by a wall or iron railing, not exceeding nine feet in height. The conditions of sale provided that no purchaser was to require or inspect the title to any of the respective roads, walks, or pleasure grounds, or to any of the premises, except to the lot purchased by him, and the vendor reserved to herself, her heirs and assigns, the liberty of erecting lodges and gates at or in all or any of the intended entrances, roads, and outlets. The purchaser bound himself by covenant to erect, within six months, a wall according to the conditions. The parish authorities, soon after the completion of the purchase, claimed the payment of 2*s*. 6*d*., which the purchaser refused to pay: they asserted their right to use the way over his land, and he filed a bill to be relieved against the sale on the ground of a fraudulent concealment. At the hearing the charge of personal fraud was withdrawn. The purchaser was ignorant of the existence of the right of way; no communication was made to him on the subject: the deed of 1820 was, of course, not included in the abstract, as the whole of the way was considered to be included in Victoria-road. In one of the deeds, stated in the

abstract, the property in question was described as adjoining the Liberty-way.

22. This is a summary of the facts of the case, but the view which was taken of the case in the House of Lords renders it necessary to state the frame of the bill and answer, and the general effect of the evidence produced. The bill stated that Victoria-road was represented in the plan produced at the sale, as the continuation south of the Liberty-way, tending in a southerly direction from King-street, situate to the northward of the lot purchased by the plaintiff, and that in the abstract the premises were described as adjoining the Liberty-way, and that from that description and the map, the plaintiff believed that the Liberty-way was comprehended in Victoria-road, which in the map was the south-western boundary of the premises, and that the wall built by him ran along the side of, and abutted upon Victoria-road. The bill then stated the claim made upon him by the parish officers, and that he then discovered the deed of 1820, and that the seller knew that the deed had been executed by Lady Augusta, and that the Liberty-way was included within the plaintiff's lot, and that she had by her agents regularly paid the rents reserved by the deed. But she pretended to be seised in fee of the whole of the lot, and never discovered the claim made, or that the deed had been executed; on the contrary, she and her solicitors and agents carefully concealed the fact that a portion of the Liberty-way was included in the plaintiff's lot, and the existence of the deed. The bill charged that the seller had lately opened a public footpath through her pleasure grounds, lying to the south of the purchaser's lot, as a continuation of the Liberty-way to the sea-shore, and that she had thereby admitted the existence of the right of way. The prayer was, that the sale and conveyance might be declared fraudulent and void, and be set aside, &c. The answer denied that she pretended to be seised in fee, but asserted that at the time she was, and accordingly claimed

to be well entitled in fee to the mansion-house and hereditaments in the bill mentioned; and in other passages to the like effect, after setting forth her title, she said she claimed to be well entitled in manner aforesaid to the fee simple *of the whole* of the premises sold to the plaintiff, *including the portion of the said Liberty-way alleged by the bill to be comprised therein*—and she submitted that the fee simple in the whole of the land enclosed by the plaintiff within the wall built by him passed to him by the conveyance executed by her, and she admitted that Wightwick was her solicitor, and that Farrer and Parkinson were her London solicitors or agents, and that they delivered the abstract, by which it appeared that she was seised in fee, unaffected by the right of way, which was not noticed in the abstract. The answer then represented the right of way to have been used only by the owners of certain lands, all of which had been purchased by Lady Augusta, and thereby the right had been extinguished; and stated that in the abstract of one of the deeds the ground was described as adjoining the Liberty-way, which was, as aforesaid, extinguished, and the defendant submitted *that from these circumstances the purchaser and his professional advisers had full notice that such Liberty-way existed, and in accepting the title waived all objections thereto, on the ground of the way being, as alleged, then in existence, or on the ground that the lot purchased by him comprehended any part of the way*. In other passages she said that by the map the purchaser was made acquainted with, or might and ought to have made himself acquainted with, all particulars relating to Liberty-way, previously to completing his purchase; and that if there was any defect in her title, it was by the neglect of the purchaser and his agents only that the same was not discovered; and she submitted that as he accepted the title with full knowledge of the matters aforesaid, he was precluded from then objecting to the same. The answer then insisted that the deed of 1820 was not binding

on Lady Augusta or the defendant, because the same solicitor was concerned for both the parish and Lady Augusta, and the latter was not aware of the limited nature of the right. And it stated that the defendant did not know till November 1840, that the deed of 1820 had been executed, or that any part of the Liberty-way was included in the lot sold. And it stated, *that her solicitor, Mr. Wightwick, had previous to the time of the sale taken pains to ascertain the direction of the Liberty-way, and had ascertained to his satisfaction that the same, as formerly used, lay wholly without the premises purchased by the plaintiff, and so believed at the time of the sale and of the completion thereof*, and that she had by her agents since 1830 regularly paid the nominal rent reserved by the deed, which she believed was made as a regular outgoing from the estate, the particulars of which, from the smallness of the sum, she was not induced to, and did not, inquire into. She admitted that she never discovered the claim or the deed to the purchaser; however, she believed that the Liberty-way was considered and believed by her agents to have been extinguished, and that if any pretence for the same existed, such Liberty-way, as it formerly existed, was included in the line of Victoria-road, "so that the deed formed no part of the title," and as she said in another passage, was not, as she was advised, necessary to be noticed. The defendant denied fraudulent, or, in fact, concealment of the payments or deed, although not mentioned to the purchaser; "the same, so far as they or any of them were known to her or her agents, being *bonâ fide* supposed and believed to be wholly immaterial to the plaintiff." She admitted that she had lately opened a public footpath through certain of her pleasure grounds lying to the south of the plaintiff's lot, which she denied had been opened as a continuation of the Liberty-way towards the sea-shore, although the same did pass from or near to the point where the way was by the bill alleged to pass out of the plaintiff's premises, and such footpath

had been made merely for the enjoyment of the pleasure grounds. And she admitted finally that Allason was her surveyor.

23. As to the evidence. 1. As to the right of way, although the boundaries were not shown, there was abundant evidence for the purposes of this suit of the existence of the right, and that the whole of the Liberty-way in front of the mansion was enclosed by Lady Augusta. Wightwick deposed, in his evidence for the defendant, that so much of the Liberty-way as passed through the lands in question was wholly stopped up in 1820 by a pale-fence, by permission of the vestry. Such was the consent of the vestry in 1820. The substituted road was to be six feet wide at the least. The plan annexed to the conveyance to the purchaser appeared to show the continuation of Liberty-way as if included in Victoria-road, as the defendant, as we have seen, stated it was understood to be. The parishioners had maintained their rights by perambulations, at intervals of a few years: one took place in 1820, after the permission of the vestry for the inclosure, and another in 1827, of course after the execution of the deed of 1820. Upon the latter occasion "the claim was made by the churchwarden of an eight feet public road. The part gone over was a straight line from end to end of the grounds in front of Mount Albion House." "When the perambulators reached the end facing King-street, where a park paling then was, there was a dispute about their going over the fence. The authorities refused to go over, as they wished to walk through, and a portion of the fence was taken down to enable them to go through. The surveyor of the highways and the parish authorities went through the opening." "No objection or opposition was made to them." The voluntary conveyance to Mademoiselle d'Este was in November 1829. In 1841, after the conveyance to the purchaser, the parish authorities inserted stones in the plaintiff's wall for the purpose of defining and denoting the Liberty-way then stopped up, and

they afterwards perambulated and got over the wall at the part where the stone was let in, and went over a gravel walk in front of the house, over a small flower border at the end of the wall. The plaintiff objected, and said he should hold them liable as trespassers. This step, at first view, seems to have been simply vexatious on the part of the claimants, as they had then the use of Victoria-road, but it was manifestly necessary to keep up the right to the Liberty-way as far as it was enclosed, inasmuch as Mademoiselle d'Este had reserved to herself the right to erect lodges, so as to exclude the public. If the Liberty-way was of the width claimed, no doubt part of it was sold to the plaintiff and enclosed by him. Upon this subject the evidence of Wightwick, the seller's solicitor, for her, was conclusive in the suit. He said that he knew the direction of Victoria-road; his impression was that the Liberty-way was a six-feet way, and that about two or three feet thereof were comprised in the Victoria-road, and that, including the wall, two or three feet were between the wall and Mount Albion House. He judged this from his recollection of the space before the wall was built, from looking out of the balcony in front of the house. He was present at the vestry meeting, and joined in the perambulations in 1820. The evidence of Allason, the surveyor employed by the seller to lay out the estate in lots, shows how it happened that part of Liberty-way was included in the lot sold to the plaintiff. It has already been referred to. He was examined for the defendant. He said that the first intimation he had of the right of way was conveyed to him by Mr. Wightwick, the defendant's solicitor, and he informed him of the claim to the right of way across the estate, and that the line was marked by stones. Allason found three marked stones at different intervals in a straight line, between the north-west end of the estate and the cliff; the stones had the letters "T. R." engraved upon the north-west side of them, and he interpreted those letters to mean the town of Ramsgate, and to denote that they were the boundary stones

between the town of Ramsgate and the parish of St. Lawrence; and as the right of way was understood by him as being claimed exclusively by the parish of Ramsgate, he concluded that if any right of way existed, it passed in the direction and on the south-west of the stones. He did not know that Mademoiselle d'Este or Lady Augusta had, by deed or otherwise, admitted the existence of the right of way. He planned Victoria-road so that it should comprise the line of Liberty-way, and it was formed in a line with and close up to and wholly on the south-west side of the stones. He believed at the time of the sale that the Liberty-way did not pass over any portion of the lot purchased by the plaintiff. He denied all concealment or directions for that purpose. 2. As to the knowledge of the solicitor and agent of the seller and of herself. That Mr. Wightwick was the solicitor of Mademoiselle d'Este was admitted by the answer, and proved by himself and by Allason: that he acted as her solicitor in preparing the estate for sale and in the sale itself, is proved by Allason and by the particulars and conditions of sale. He was stated in the particulars as one of the persons to supply them. By the conditions, the purchaser was to enter into an agreement for payment of the remainder of the purchase money at the office of Farrer & Parkinson or at the office of Wightwick, *at one of which places the purchase was to be completed.* An abstract of title to small lots was to be left at Wightwick's office for the inspection of purchasers; and purchasers were to pay a per-centage into his hands as a trustee for the formation of an esplanade and walks. Wightwick, in his evidence *for the defendant*, stated that he had known Liberty-way 23 years; was present at the vestry meeting in 1820; assisted in the perambulation, and knew that the stones were placed. He particularly recollected Lady de Ameland directing his attention to the nuisance to which she was subject from the Liberty-road being open in front of Mount Albion House; there was the Liberty-way running between the house and

the fence; the Liberty-way was not defined or limited, except so far as the park paling on one side and Mount Albion House on the other formed a boundary; it was a rough road. He then deposed to the stopping up of so much of Liberty-way as passed through the said lands by the permission of the vestry, and the substitution of another road for the part of the Liberty-road so stopped up. And that very soon after the Liberty-way was so stopped up, mark-stones were placed, *supposed to be in the centre of the Liberty-way as it originally run*, so as to mark and distinguish the line and direction thereof; *the stones were marked denoting what was then called the township of Ramsgate, and the parish of St. Lawrence*, by the authority of the vestry, &c. of Ramsgate, and the surveyor of St. Lawrence: those stones showed the division of the liberty of Ramsgate from the parish of St. Lawrence. His impression was that Liberty-way was a six-feet way, and that about two or three feet thereof were comprised in the Victoria-road; and that, including the wall, two or three feet were between the wall and Mount Albion House; he judged this from his recollection of the space before the wall was built, from looking out of the balcony in front of Mount Albion House. In his examination *for the plaintiff*, he said, " as the solicitor or agent of the defendant, and also on the part of Lady de Ameland, for several years he paid the two sums of 2*s.* 6*d.* as an acknowledgment of an alleged right of way near and in front of Mount Albion House. He made some of such payments on the part of the defendant. He did clearly know that such right of way was claimed, and that such payments were made by him on her behalf, as an acknowledgment of such right or alleged right. He knew for what those sums were paid, having been present at the vestry meeting in February 1820, when permission was granted to Lady de Ameland to enclose the part of Liberty-road in front of Mount Albion House. He made the payments under his general authority as agent, and rendered his

accounts from time to time to both Lady de Ameland and the defendant, in which such payments would appear. [The accounts thus furnished were not produced in the House of Lords, so that the manner of the entry did not appear.] Allason, as we have seen, had his information of the right of way from Wightwick. It appears by an entry in the vestry-book of 1839 that the deed of 1820 was in the possession of Mr. Daniel, the solicitor, "who holds the deed for the benefit of both parties." 3. As to the footpath opened after the sale by Mademoiselle d'Este, the parishioners of St. Lawrence, on the 31st August 1839, resolved that mark-stones should be placed outside the wall at Mount Albion House, denoting how many feet the Liberty-way was from the mark-stones; and they gave permission to Mademoiselle d'Este to stop up the Liberty-way leading to the cliff from the mark at the end of Mount Albion wall, on condition that a road should be made for the parish 15 feet eastward, as agreed upon by Mr. Allason, the agent of Mademoiselle d'Este, and the vicar and another on the part of the parish; the condition of the permission being that Mademoiselle d'Este pay 5 *s.* per annum as an acknowledgment of the right of the parish and of the town of Ramsgate to resume if they thought proper their Liberty-way, according to a deed of agreement entered into by Lady Augusta de Ameland (which deed was in Daniel's possession, as before stated). The bounds of the parish were guaranteed to be gone over the wall opposite Albion House by Mr. Allason, agent to Mademoiselle d'Este, on the proper legal notice being given. And the vestry desired a copy of the resolutions to be sent to Mr. Allason, as Mademoiselle d'Este's agent, and also to the committee of the town of Ramsgate. We have already seen Mademoiselle d'Este's statement in her answer as to the making of the footpath. Allason in his cross-examination by the plaintiff said, that Mademoiselle d'Este did immediately after the sale of the estate make a public path across her estate,

leading to the sea, which run upon, or nearly upon, a place or way alleged to be called Liberty-way, across the said estate. A right of way was claimed by the public, or the parish, across the estate nearly in the line of the path so opened. It was not, to his knowledge, common for persons to pass across the estate in the direction of such path before the same was opened by the defendant. The fences or palings of the defendant upon the estate, which then obstructed or interfered with the line of the path since opened by her, had been occasionally broken or destroyed by persons passing over the estate in the direction of the pathway opened by her; which pathway was, he believed, a continuation of the line of the way alleged to be called Liberty-way, then claimed across Mount Albion, in the direction of the sea. 4. The parish formally required, through their solicitor, payment from the purchaser of the arrears of the rent, under the deed of 1820, or in default of payment that he would re-open Liberty-way, and remove the enclosures, pursuant to the provision and undertaking of Lady de Ameland contained in such deed. The solicitor of the purchaser had previously written to the London solicitors of Mademoiselle d'Este, stating the demand made under the deed executed by Lady de Ameland, and that understanding that Mademoiselle d'Este through her agents had paid the yearly acknowledgment, and therefore must have had a knowledge of the deed, requested to know whether she would take upon herself the defence of the claim to the Liberty-way, or furnish him with evidence that that claim could not be sustained, and whether she had been accustomed to pay the 5*s*. then demanded of the purchaser. This was in March 1840. The next letter, written in January 1842, was a simple inquiry by Mademoiselle d'Este's solicitors without prejudice, before she put in her answer, whether a compensation would be accepted, which in February 1842 was declined.

24. The Vice Chancellor Knight Bruce pronounced a

decree in favour of the purchaser, rescinding the contract, with costs. He said that the required inclosure by a wall or iron railing of the lot, and the aspect and character of the plan annexed to the particulars of sale, coupled with the silence of the particulars and conditions of sale as to any right of way, must, in his opinion, be considered as tantamount to a representation that the lot was not subject to any right of way. The purchaser, in his opinion, completed his purchase in ignorance of the deed of 1820 and of the pecuniary payments made under it. He conceived that the plaintiff was to be considered a purchaser without notice, actual or constructive, of the defects in question. He also was of opinion that the contract and its completion took place under concealment from the purchaser, and substantially under misrepresentation to him of material facts within the knowledge of the seller or of her agent, whose knowledge, for the present purpose, must be held equivalent to her knowledge, but he concurred with the plaintiff's counsel in not imputing any want of integrity, any want of good intentions to the seller personally, but, as a learned Judge asked in another case, he asked (though not in a sense offensive to any person), must not a court infer fraud from the combination of the knowledge that existed with the representation made and the facts not disclosed. He relied upon the cases at law establishing that a wilful falsehood may be a fraud although the party sought no advantage for himself, and also upon the cases in equity, particularly that of Edwards *v.* M'Leay, Coop. 312, 2 Swanst. 289, where the contract was rescinded, and Lord Eldon considered the case to resolve itself into this question, whether the representation made to the plaintiff was not in the sense in which the Court uses the term fraudulent. He (Lord Eldon) agreed with the Master of the Rolls that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, the Court would rescind the contract. The Vice Chan-

cellor, in conclusion, thought that if the true facts had been discovered by the purchaser between the contract and the completion of the purchase, and he had thereupon rejected the contract, he would have been upheld both in equity and at law in that rejection, and the notion of compensation would have been excluded upon principles of reason and justice as well as upon authority. The decree declared that, under the circumstances, the contract was void, and that the sale could not stand, with consequential directions. This was the result of a long discussion on settling the minutes. The plaintiff asked for a declaration that the sale and conveyance were fraudulent and void, and this form was departed from at the request of the counsel for the defendant. The word "fraudulent" was only used technically, but in that sense the Vice Chancellor considered the sale fraudulent within the view of a court of equity, and on that ground set it aside.

25. From this decree there was an appeal to the House of Lords. The appellant's case stated that the contract and conveyance were set aside on the ground of fraud, and the reasons for the reversal prayed were, first, because there was neither fraudulent misrepresentation nor wilful concealment on the part of the appellant or her agents; second, because there was no sufficient damage to the plaintiff, and that if a claim could be established by him, it could only be for compensation. The principal reason of the respondent in support of the decree was, because the contract and its completion took place under concealment from the respondent, and substantially under misrepresentation to him of material facts, within the knowledge of the appellant or her agent, amounting in equity to a fraudulent concealment and misrepresentation of such material facts, the purchaser not having the means of knowing the true state of those facts. The Lords reversed the decree, and dismissed the bill with costs, upon the motion of Lord Cottenham, C., and with the concurrence of Lord Brougham and Lord Campbell.

26. The Lord Chancellor first observed upon the unusual form of the decree in abstaining from any imputation of fraud, which strongly implied that the Vice-Chancellor was satisfied that the evidence did not establish any case of fraud (I). This led him to consider whether, upon the frame of the bill, the decree could be supported upon any other ground than fraud. Fraud was disproved by the evidence on both sides. The deed of 1820 never was in the possession of the defendant, and there was not only no proof of her having had any knowledge of the deed or of its contents before the sale and conveyance, but the contrary was clearly proved: no attempt was made to establish such knowledge (II). The frame of the bill would probably have been a sufficient answer to a sufficient case: but the case did not rest upon that ground, as, in his opinion, the case proved would not have been sufficient to entitle the plaintiff to relief though properly alleged. He then stated the facts shortly, and added, that the centre of the way and the boundary line had been considered identical depended upon what had taken place in 1820, of which the defendant had no knowledge. *The deed of* 1820, *if she had known its contents, would not have informed her of this, nor would the payment of the two sums of* 2*s.* 6*d. each; for although from both it might have been inferred that in some point the way touched upon land in the liberty and in the parish, neither would show that it touched upon both at the point of the plaintiff's land. And as to these payments, there was not sufficient evidence that the defendant knew that such payments had been made, and none that she knew for what they were made.* Wightwick's accounts were not produced, and unless such entries had specified that the payments to St. Lawrence were made in respect of the right of way run-

(I) See before, the statement of what passed on settling the minutes.

(II) I do not observe any such evidence of contrary proof except her denial by her answer; and Wightwick, her solicitor, swore she had such knowledge.

ning over the land bought by the plaintiff, they would not have given any information of the fact of which the plaintiff complained. *It was true that the deed, if it had been in possession of the defendant, and the payments, if known to the defendant, might have amounted to constructive notice being sufficient to put a party upon inquiry.* The effect of constructive notice, in cases where it was applicable, or in contests between equities of innocent parties, was sufficiently severe, and was only resorted to from the necessity of finding some ground for giving preference between equities otherwise agreed [*qu.* equal]. But this was the first time he ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things could not exist together; there could be no direct personal fraud without intention, and there could be no intention without knowledge of the fact concealed or misrepresented, and if there were knowledge the case of constructive notice could not arise: it would be absorbed in the proof of knowledge. There was not in this case any misrepresentation or statement in the nature of a warranty; there was a dealing with the property inconsistent with there being a right of way; but no statement or warranty that there was not a right of way; a distinction important to be borne in mind when the case was compared to an action for deceit, in which, under such circumstances, the *scienter* was the essence. An attempt to affect the defendant with all the knowledge which Wightwick professed on the subject failed; first, because, although he was the agent of the defendant for certain purposes connected with the sale, it did not appear that the purchaser had any communication with him respecting the purchase, except in paying a stipulated per-centage towards the expenses of a terrace walk. The whole transaction of the purchase was conducted in London. *The documents preparatory to and connected with the purchase may have been prepared by Wightwick, but when prepared they became the representations of the vendor, and*

what knowledge the person may have had who prepared these documents was immaterial. He may have been guilty of neglect towards his employers in permitting the preparation and use of inaccurate papers on her behalf; but not having any personal communication with the purchaser, the latter cannot complain of having been deceived by any misrepresentation made by him. *It was, however, clear that Wightwick himself could not, as between these parties, be considered as having more than constructive notice of the fact alleged by the plaintiff.* What knowledge he acquired in 1820 was immaterial, as at that time he was not acting for the defendant or for Lady Augusta; and although he paid the 2*s.* 6*d.* to St. Lawrence and Ramsgate for the defendant, such payment would only show that some right of way had been supposed to pass over some part of the land in each of those districts, but could only be constructive notice of its affecting the plaintiff's land. Besides the plaintiff should have named Wightwick in the bill as the person committing the fraud. If therefore the right of way had been proved, and the case had been properly stated, which they were not, the defendant had no knowledge of the fact complained of, but had within her reach means of such knowledge that is, constructive notice, but no representation of any kind took place. It was not and could not be contended that such circumstances would entitle the purchaser to have a completed purchase set aside. Direct personal fraud was attempted to be supported by some expression in the deposition of Wightwick, in which he said the defendant had knowledge of the right of way claimed over the land purchased by the plaintiff; *But he did not say how he proved such knowledge, and coupled with what he says respecting the deed, and the payments, he must be understood as intending to say that the defendant must, as he supposes, have known of the claim from the fact of such deed having been executed, and such payments having been made.* Finding that evidence at the most only raised a case of constructive notice, the Lord Chancellor

said that he waited with some curiosity to learn the ground or authority on which the decree was to be supported. The principal reliance was on Edwards *v.* M'Leay, 2 Swanst. 287, but there were there knowledge in the vendor, and a false representation, both of which were wanting in this case; and he relied upon the case of Legge *v.* Croker, which was not quoted in the Court below, or on the appeal, and to which our attention will again be called. The result was that the plaintiff having rested his case upon imputations of direct personal misrepresentation and fraud could not be permitted to support it on any other ground. 2dly. That nothing short of positive knowledge could be sufficient to set aside the completed purchase. The case alleged was not proved, and the case proved was not alleged, and if it had been would not have been sufficient to support the decree.

27. Lord Brougham entirely concurred in this view. Fraud was clearly alleged, but nothing of the kind had been proved, and nothing had been adduced as a substitute for the proof. It was no question of constructive notice. Constructive notice was only where actual knowledge was not alleged: here actual knowledge was alleged. Now though it might not have been proved that she actually knew of the deed-poll, though on the contrary it might have been proved that she had not actual knowledge of the deed, yet by way of substitute, payment of the 2 *s.* 6 *d.* rent by her agents was alleged. Now, in the first place, ***it was not proved that the accounts in which it was said the 2 s. 6 d. paid by the agent was entered ever did contain that entry, for the accounts were not produced*** (I): in the next place, it was not

(I) The accounts are not in the appendix of proofs before the House of Lords; but the Vice Chancellor in his judgment observed, after stating Wightwick's evidence as to the payments, "Certain accounts which are stated to be all or some of the accounts with the defendant thus mentioned by the witness are in her possession; *two at least of them are in evidence; they appear to correspond with the witness's description of them, and to contain items of 2 s. 6 d. as paid in respect of Liberty-way.*" 2 Coll. N. C. 567.

proved that she had that knowledge, therefore *in order to prove her knowledge you must assume that she knew of the accounts which she did not, but the contrary, and that the accounts contained the entry,* and as a proof of knowledge and suppression of that knowledge you must further prove that the accounts if produced and if seen by her, *though they are not proved to have been seen by her,* did contain an entry that the 2 *s.* 6 *d.* was paid in respect of that right of way to the parish of St. Lawrence. It was ridiculous to suppose that you could make all these assumptions in a court where the foundation of the whole claim was fraud, alleged by the concealment of a fact well known. The cross-examination (I) of Wightwick, the defendant's witness, was said to prove the case alleged by the plaintiff, *but as the Lord Chancellor observed, when you come to look at the question by the reference to the last antecedent, it does not mean what it was alleged to have meant, the position of the way in the parish, and did not therefore refer to the substance of the answer, and consequently there was nothing in that* (II). After referring to the two cases referred to by Lord Cottenham, he said that there was first a total failure in proof of the case alleged, and secondly, the case that was proved was totally insufficient to support the claim. He then referred to the cases at law, particularly Haycraft *v.* Creasy, 2 East, as to the *scienter*, and the mode of alleging it. He was therefore clearly of opinion that there had been as great a miscarriage of justice in the court below as he had ever seen.

28. Lord Campbell had come to the clear conclusion that the decree ought to be reversed. He entirely dissented

(I) He was not cross-examined, but examined in chief by the plaintiff.

(II) Lord Brougham afterwards stated that he referred to Wightwick's deposition for the plaintiff, in which, as we have seen, he stated the several payments made by him as agent, and Mademoiselle d'Este's knowledge of the right of way, and of the payments by him, as an acknowledgment of the right.

from the position that an action of deceit could be maintained without positive fraud, and the counsel for the respondent, he said, acquiesced in the view that this was to be considered as if it were an action of deceit. There must be a falsehood stated, which is a breach of moral obligation, and that is fraud, which will support an action of deceit. It had already been shown in the clearest manner there was not a particle of evidence to support the allegation in the bill, which asserted in the most positive manner that the defendant at the time of the sale not only knew of the deed of 1820, but knew of the direction of the Liberty-way, and knew that Liberty-way came upon the ground which was sold to the plaintiff. Here the case made was a fraudulent representation by the principal, not by an agent. But, in the first place, *there was no evidence which they were at liberty to pay attention to that Wightwick in making the representation at the time of the sale* (1), *was the agent of the defendant, and if he was the agent there* was no evidence whatever that he in the course of the agency acquired any knowledge, or at any time had any knowledge, of the direction of the road, and on that the whole turned, because the mere knowledge of the Liberty-way was nothing, and the mere *knowledge of the deed of* 1820 *was nothing unless he in the course of his agency acquired a knowledge of the direction of the Liberty-way, and that part of the Liberty-way extended within the wall, which was asserted by the plaintiff. The knowledge then amounted to nothing: he had no knowledge which would show that he was guilty of any fraudulent misrepresentation.*

29. The opinions expressed by the Lord Chancellor and the other law Lords render it necessary now to consider what the facts of the case really were, and how the rule of law bears upon them. 1. As we have seen the whole of Liberty-way as far as it was stopped up, was enclosed by

(1) He does not appear to have made any representation at that time.

Lady Augusta, only three feet were thrown into Victoria-road, and that road adjoined the lot sold to Gibson; the evidence of the width of the way proved clearly that some part of the way was still left in Gibson's lot: and this is stated by Wightwick to be his impression in his evidence for the seller. Lady Augusta had by the deed of 1820 precluded herself, and those claiming under her, from contesting the right claimed to the way whilst that deed remained unimpeached. Mademoiselle d'Este by her answer insisted as a defence that the right of way was extinguished, and if not, that the deed was not binding on her. But this defence was necessarily abandoned at the bar. If Lady Augusta had sold to Gibson in the same way in which the sale to him by Mademoiselle d'Este was conducted, it will not be disputed that the purchase must have been set aside upon his application. Now, 2, As to Mademoiselle d'Este as the seller: she claimed as a volunteer under Lady Augusta, and of course took at once the benefit and became liable to the burden of the deed of 1820. That deed was in the possession of Mr. Daniel, of Ramsgate, formerly Lady Augusta's solicitor, as well as the solicitor of the parish, who held the deed for the benefit of both parties. It was proved for the plaintiff as coming out of the possession of Daniel. It was, therefore, in the proper custody, and always within the power of Lady Augusta and Mademoiselle d'Este. Lady Augusta paid the rents during her ownership, and Mademoiselle d'Este regularly for eight years paid the two rents of 2 *s.* 6 *d.* each to Ramsgate and St. Lawrence, and it was sworn that the officers regularly carried these sums to account. The stones inserted marked the line, and the parish officers had made a perambulation, with a great parade, through the ground in 1827, notwithstanding the enclosure, and the property was conveyed to Mademoiselle d'Este, for love and affection, in 1829. Upon these simple facts, ought she, as between herself and a purchaser from her, to whom neither the right of way nor the deed of 1820 had been communicated, although part of the way was sold

to him, to be allowed to say that she was ignorant of the right and of the deed at the time of the sale and conveyance? It would be dangerous to the dealings of mankind to admit of such a defence. But the case did not rest here. The Lord Chancellor said that it was clearly proved that Mademoiselle d'Este had no knowledge of the deed or its contents before the sale and conveyance. This must refer to the passage in her answer, in which knowledge by her was denied. The Lord Chancellor also said that knowledge of the contents of the deed, and payment of the two sums of 2 *s.* 6 *d.* each, would not show that the way touched upon land in the Liberty and in the parish at the point of the plaintiff's land. And as to these payments, there was not sufficient evidence that she knew that such payments had been made, and none that she knew for what they had been made. The accounts of Wightwick were not produced. Possession of the deed and knowledge of the payments might have been sufficient to raise a case of constructive notice being sufficient to put her on inquiry, but that would not support the plaintiff's case. Lord Brougham added that it was not proved that the accounts ever did contain the entry of payment of the 2 *s.* 6 *d.*, *for the accounts were not produced.* To prove her knowledge, you must assume she knew of the accounts, *which she did not, but the contrary, and that the accounts contained the entry.* These statements seem to be hardly reconcilable with the facts. Mademoiselle d'Este by her answer admitted that she had, by her agents, since 1830 regularly paid the nominal rent reserved by the deed, which she believed was made as a regular outgoing from the estate, the particulars of which, from the smallness of the sum, she was not induced to and did not inquire into. This admission is complete as to the fact of the payments and her knowledge of them. Wightwick, her solicitor, in his evidence for the plaintiff, swore distinctly to the payment of the two sums of 2 *s.* 6 *d.* yearly, and he also swore that he rendered accounts from time to time to Lady Augusta and to Made-

moiselle d'Este, in which such payments would appear. These accounts were not produced, but that did not affect the evidence of the fact of payment nor her admission of the fact, and the actual receipt of the 2 *s.* 6 *d.* for seven or eight years up to 1838 from Wightwick, the agent of Mademoiselle d'Este, was proved by the surveyor of the commissioners of pavement of Ramsgate for the use of liberty-road. This was conclusive; and if the seller had been deemed to have knowledge of the deed of 1820, surely no further knowledge was necessary to be proved. It does not seem to be correct to compare this with the common case of constructive notice. If I honestly buy an estate without notice of an incumbrance, yet if my agent knew of it, or there were sufficient circumstances to lead me to inquire, I am bound by this constructive notice. This is, no doubt, very hard; for I am bound by an incumbrance of which I really had not notice. But how does this apply to a case where an owner of an estate in possession pays interest or rent under a charge created by the person under whom he claims as a volunteer—a charge which he cannot displace, and which he must satisfy. The notice runs as it were with the charge. The payment by an agent cannot weaken the case where the agent knows why he pays, and the receiver knows why he is entitled to receive. The owner does not think fit to inquire why the payment is made, although marks to support the right are set up on the estate, and the deed creating the charge is in the custody of a person in the town who holds it for his benefit, and the right is a public one, and publicly claimed at intervals. The neglect to inquire does not impeach the charge or weaken the effect of the payments. The question does not appear to be whether the perusal of the deed or the entry of the payments would show the precise line of road, but whether the deed and payments which bind the owner to the actual line of road, are not as between him and a purchaser without notice, conclusive evidence that the seller knew, as he was bound to

know, the exact rights which were secured by the deed and acknowledged by the payments. On the one hand to fix an owner under such circumstances with that which he is bound to know inflicts no injury. It renders him neither more nor less liable. But to consider these circumstances as conveying to him no notice of the real nature of the charge is to enable him upon a sale to throw the burden off from his own shoulders and to cast it upon those of an innocent purchaser who was in no manner liable to it. Mademoiselle d'Este's advisers saw this matter in a very different light: for although the purchaser really had no knowledge whatever of the deed of 1820, or that the right of way ever extended over any part of his lot and was ignorant of the payments, and none of these facts was disclosed to him on his purchase, yet by her answer she insisted, not that she had not in law notice of the nature of her own title, but that in consequence of a description in the abstract, and a reference to liberty-way in a map, the purchaser and his advisers had full notice that such liberty-way existed, and had waived all objection thereto by accepting the title: she insisted that it was by the neglect of the purchaser and his agents that he did not discover that part of the way was in his lot, and that he was bound to inquire. The pleader did not anticipate the view which would be taken of the case in the House of Lords (1). But the matter does not rest here.

(1) Upon a similar attempt to fix the purchaser in Edwards *v.* M'Leay with notice, Sir W. Grant observed that it was a little extraordinary that the defendants, who contended that the rumour which they admit they had heard about this part of the ground being taken from the waste excited in their minds no suspicion that the ground included in the plaintiff's purchase had ever made part of such waste, should yet insist that the very same degree of information possessed by the plaintiff's father [who bought the property on the part of the plaintiff] was to him full notice of a fact which they were unable to infer from such information. But it was still more extraordinary when they considered the very different degrees of knowledge which the two parties possessed on the subject. The defendants, when they made their purchase, found the whole of the ground, which was now proved to have

Mr. Wightwick, her solicitor, in his evidence for the plaintiff, stated distinctly that Mademoiselle d'Este did clearly know that such right of way was claimed, and that such payments were made by him on her behalf as an acknowledgment of such right or alleged right: he then states his own knowledge, and how he acquired it. This clear evidence was in effect rejected in the Lords, although with the circumstances it was according to the rule in equity conclusive against the answer, unless it had been deemed a proper case for further inquiry, and that had been sought for; for the Lord Chancellor observed he did not say how he proved such knowledge, and coupled with what he said respecting the deed and the payments, he must be understood as intending to say that the defendant must, as he supposes, have known of the claim from the fact of such deed having been executed and such payments having been made. But this statement of the witness, her own solicitor, does not appear to be controlled or affected by any other statement by him, and there does not appear to be any sufficient ground for the supposition: his statement is a distinct one, that she clearly knew of the claim and of its acknowledgment by the payments on her behalf. Very slight evidence, if any were required, ought to be sufficient to fix an owner of an estate with the knowledge of an actual charge on his estate, his liability to which admits of no dispute. Besides, even in the view taken by the Lord Chancellor, the witness

been taken from the common, lying together in one plot. They divided off the piece on which the four houses were built. When they therefore heard it asserted that this piece had been taken from the common, they might reasonably enough doubt whether the whole was not in the same predicament. But a stranger who had never seen the ground but in this divided state (which as far as appeared was the plaintiff's case), would have no reason to suspect that what was asserted with respect to one division must equally apply to another from which it was apparently distinct. The seller admitted he did not tell the purchaser that this was a division recently made, or give him any information from which he could collect that the assertion if true as to one part must equally apply to the whole. Coop. 317, 318.

must be understood as intending to say that Mademoiselle d'Este, from *her* knowledge of the deed and of the payments, knew of the claim and of the acknowledgment of it; any other interpretation, even in this view, would be to make him speak in a sense contrary both to his language and his manifest intent: he could not mean by such a direct averment, that her knowledge arose from the circumstances that a deed had been executed and payments had been made, of both which she was ignorant. Lord Brougham appears to have supported the Lord Chancellor's view on this point, for when, he said, you look at the question by the reference to the last antecedent, it does not mean what it was alleged to mean. There is probably some mistake in this portion of the short-hand writer's note, as there does not appear to be any antecedent to which you ought to refer. I may observe that the resolution of the vestry in 1839, and the formation of the new footpath shortly after the sale, as proved by Allason, the surveyor, are circumstances entitled to some weight on this head. And in considering how far the seller or her agents had or ought in law to be deemed to have had notice of her rights and liabilities—for one was inseparable from the other—we ought to enter upon the inquiry irrespective of the use to be made of the fact if it should be established. We may now consider, 3, what knowledge Wightwick had, and how far that affected the seller. As to Wightwick, the Lord Chancellor held that the attempt to affect the defendant with all the knowledge which he possessed on the subject failed, although he was her agent for certain purposes connected with the sale, because the whole transaction of the purchase was conducted in London. The preparation of the documents was immaterial, for when prepared they became the representations of the vendor, and what knowledge the person may have had who prepared the documents was immaterial: as he had no personal communication with the purchaser, the latter could not complain of having been

deceived by any misrepresentation made by him. It was besides clear that Wightwick himself could not, as between these parties, be considered as having more than constructive notice of the fact alleged by the plaintiff. Lord Campbell said that there was no evidence which they were at liberty to pay attention to, that Wightwick, in making the representation at the time of sale, was the agent of the defendant, and if he was the agent there was no evidence whatever that he, *in the course of the agency*, acquired any knowledge, or at any time had any knowledge of the direction of the road, and on that the whole turned, because the mere knowledge of the Liberty-way was nothing, or the mere knowledge of the deed of 1820 was nothing, unless he *in the course of his agency* acquired a knowledge of the direction of the Liberty-way, and that part of the way extended within the wall as asserted by the plaintiff. These opinions seem to be at variance with both the facts and the law applicable to the case. We should bear in mind that this is not a case in which an innocent purchaser is attempted to be fixed with an incumbrance merely because his solicitor or agent had notice of it. The rule which was established to prevent fraud was modified by requiring the notice to the solicitor or agent to be in the same transaction (*z*), but even this relaxation does not prevent notice to a solicitor or agent, whenever or however obtained, from binding his principal if the circumstances show that the knowledge had not passed from his mind at the time of the purchase (*a*). But this is a case of a wholly different nature. It was the duty of Wightwick, as the family solicitor, to make himself master of the real nature of the right claimed, and his knowledge must in dealings between his client and third persons be deemed the knowledge of the client. His knowledge,

(*z*) See the cases, Sugd. Purch. 1043.

(*a*) See the cases, *ubi sup.*

as in the general case, is not to operate as a sword to attack his client, an innocent purchaser, but to enable him to put his client in possession of the real nature of his rights and liabilities. *It creates no liability to a charge to which the client would not otherwise be liable.* It is wholly indifferent therefore whether the solicitor obtained the knowledge in the course of his agency or not. The only question that could arise would be whether he had a recollection of the fact at the time of the sale (I). The Lord Chancellor considered that Wightwick's knowledge could not affect his client, because the transaction was conducted in London. Now Wightwick was not simply, as represented, the agent of the defendant for certain purposes connected with the sale, but he was her solicitor generally, as she admitted by her answer, and as he proved in his depositions, and the particulars and conditions of sale show that he was in all respects her general solicitor in the transaction of the sale. And even in a common case a purchaser is bound by notice to his agent, although he employ him only in a part of the transaction (*b*). Here too, Wightwick was sure to come into communication with the purchaser, as the transaction was about to close, for he was the trustee of the per-centage to be paid for terrace-walks, the payment of which to him was acknowledged by the conveyance. Lord Campbell went further, and said that there was no evidence which they were at liberty to pay attention to, that Wightwick in

(*b*) Bury *v.* Bury, Sugd. Purch. 1042.

(I) See Burrowes *v.* Lock, 10 Ves. 476, where a trustee having had notice, was charged in respect of a misrepresentation to a purchaser, his excuse was that although he had received information he did not at that time recollect it. Sir W. Grant said it was at least *gross negligence* to take upon himself to aver positively and distinctly that the party was entitled to the whole fund without giving himself the trouble to recollect whether the fact was so or not, without thinking upon the subject. See Arnot *v.* Biscoe, 1 Ves. 95; Evans *v.* Bicknell, 6 Ves. Jun. 174.

making the representation at the time of sale was the agent of the defendant. As we have seen, no such representation was made; but upon the evidence which was received without objection, and which was open to none, it is clear that Wightwick was the seller's solicitor generally in the transaction. What difference did the conducting of the transaction in London make? It was not alleged that there was any express representation by Wightwick that there was no right of way over the lot in question. The Lord Chancellor said that the documents might have been prepared by Wightwick, but when prepared they became the representations of the vendor, and what knowledge the person had who prepared those documents was immaterial. He put the case as one in which Wightwick might have been guilty of neglect towards his employers in permitting the preparation and use of inaccurate papers on her behalf. But the person who suffered by his neglect was not his own client, but the innocent purchaser, and it was not of direct personal communication he complained, but of the documents, viz. the particulars and conditions, abstract and plan, which were so prepared as to mislead the purchaser, as they would have done any man, into the belief that he had purchased a title in fee, which would confer on him the right to inclose the ground, in front of which he was bound to erect a wall. If, as it was said, these representations became, as they clearly did, the representations of the vendor, how could she accept and use them unaffected by the knowledge of the agent who prepared them. If she adopt his act, she must upon every sound principle be bound by his knowledge. If the rule were otherwise, a wide door would be opened to fraud in the preparation of abstracts, and that simply to relieve a seller from a liability, which ought to continue to charge him, and to throw it on a purchaser who ought not to be made liable to it.

30. As regards these transactions, we may refer to the rule as adopted by the Court of King's Bench in Fuller *v.*

Wilson, and applied to the facts of that case as they were then understood (I). A representation was made that the rent of a house sold was 100 *l.*, free from rates and taxes. The owner made no representation at all, and her attorney who made it did not know it to be false. The Court held that whether there was moral fraud or not, if the purchaser was actually deceived in his bargain the law will relieve him from it. *They thought the principal and his agent were for this purpose completely identified, and that the question was not what was passing in the mind of either,* but whether the purchaser was in fact deceived by them or either of them. And it has been laid down that no distinction should be made between an active and a passive communication, for a fraudulent concealment is as bad as a wilful misrepresentation (II). It is perfectly clear that upon a sale, the vendor is bound to furnish the purchaser with all the documents relating to the title, and to inform him of all facts necessary to be known which are within his knowledge, relating to the title, and which do not appear on the face of the abstract. If any document or fact be withheld fraudulently, of course the purchaser is entitled to relief, and

(I) 3 Adol. & Ell. N. S. 58. It afterwards appeared that the auctioneer was the purchaser, and that the injury of which he complained had arisen from his own misapprehension of the fact, and not from any misrepresentation or concealment on the part of the seller; and he had no relief, but it was admitted that the principal would be bound in a civil action by the concealment of which her agent was guilty.

(II) Early *v.* Garrett, 9 Barn. & Cress. 928. The purchaser had paid his money for the land, to be taken with all faults and defects of title, if any. Before the execution of the agreement the purchaser asked the seller whether any rent had ever been paid, and he replied that no rent had ever been paid either by Coward (whose assignee the seller was) or any person under whom he claimed; whereas the fact was that the title was under a lease, and Cox, who sold to Coward, and conveyed the fee by a feoffment and fine, had paid two years' rent. The jury found that the sellers believed that no rent had been paid, and of course the purchaser did not recover the purchase-money; their assertion therefore was held not to be fraudulent. The authorities established that the concealment must be fraudulent. The jury were told that if the seller believed that rent had been paid or was payable by Cox, the non-communication of that fact was fraudulent.

even where the omission is not owing to moral fraud, but the seller or his agent exercises his own judgment, and excludes an important document from the title, and the objection arising upon it is not a subject of compensation, it appears to me that equity is bound to relieve the purchaser from the contract; particularly where, as in this case, the seller by a condition precludes the purchaser from making an inquiry which would have led to the discovery of the document not produced. Although there be no moral fraud the seller is responsible for the act of his agent, and must abide the consequences of his act. Mademoiselle d'Este put her defence in her answer upon several grounds: 1st, That no right of way existed, and that the deed of 1820 did not bind her. 2dly. That the purchaser had sufficient notice to put him on inquiry, and therefore was bound. 3dly. Her own want of knowledge, for she nowhere set up a want of knowledge in Wightwick, but on the contrary, stated that her solicitor, Mr. Wightwick, had, previous to the time of the sale, taken pains to ascertain the direction of the Liberty-way, and had ascertained to his satisfaction that the same as formerly used lay wholly without the premises purchased by the plaintiff, and so believed at the time of the sale, and of the completion thereof. Now the evidence did not prove this statement. Wightwick gave imperfect information to Allason, and withheld from him all knowledge of the deed of 1820, and Allason acting upon this imperfect information left part of Liberty-way in the lot containing the mansion-house. Wightwick probably thought that the parishes would make no further claim when Victoria-road was set out. It must be considered as a case in which, without moral fraud, the seller's agent withheld an instrument of which he had full knowledge, and which was in the seller's power, and the concealment of which endangered the purchaser's title in an important respect. And further, the condition as to the title to the

road (I) was calculated to prevent inquiry, which would have led the purchaser to the knowledge of the deed withheld, whilst the statement in the abstract, and the description in the map, and the condition imposed on the purchaser to inclose the spot in question with a wall amounted to a declaration that no impediment existed to his maintaining the wall when erected. *The state of the title when Gibson purchased* was that the part of Liberty-way which was within the fence was inclosed under the conditions secured by the deed of 1820. This Wightwick well knew, and he ought to have included that deed in the abstract, and stated the manner in which the way was intended to be thrown into Victoria-road. Instead of that he concealed the deed, and took upon himself to render that deed of no importance to the title, but neglected to take the proper steps to effect that object. Upon whom should the loss fall but upon his client, the seller? It was a case really of imperfection of title through the negligence of the seller and her agents where the purchaser had no means of knowledge, and the deed and the facts which would have communicated the knowledge to him were purposely withheld from him. Suppose the Liberty-way had been a strip of land held by the seller under a lease at 5 *s.* a year, and her agents had chosen to hold back all knowledge of the lease from the purchaser, intending to throw the whole into the public way, but had actually left half of it in the purchaser's lot, would not that be a ground for relief? Yet that is not distinguishable from the case as it stands. But the Lord Chancellor then objected that Wightwick himself had only constructive notice of the fact alleged by the plaintiff. The knowledge he acquired in 1820 was immaterial, as at that time he was not acting for the defendant or for Lady Augusta, and the payment of the 2 *s.* 6 *d.* could not be constructive notice that

(I) The conditions also stipulated that the vendor was not to be called upon to identify the lots with the former descriptions.

the way affected the plaintiff's land. Lord Campbell also relied upon the circumstance that there was no evidence whatever that he in the course of his agency acquired any knowledge, or *at any time* had any knowledge of the direction of the road, which he considered necessary in order to affect the vendor. It has already been submitted that it is immaterial when the knowledge was acquired; and it would indeed be dangerous to hold that such knowledge as is above referred to should not be held sufficient to fix the agent in such a case with notice of the real nature of the obligations of his client. Here, however, the fact of actual knowledge on the part of Wightwick appears to be clearly proved, and that knowledge was kept alive, and never departed from him, so that he knew all the facts necessary to be known to impart full knowledge of the liability cast upon the purchaser. Wightwick deposed that he had known the house and grounds for about 20 years: he had known Liberty-way for 23 years and upwards; his attention was particularly called to it in 1820 from being present at the vestry meeting in that year: he then stated the circumstance before mentioned of Lady Augusta calling his attention to the nuisance occasioned by the way; he said, the exact line of the way prior to the stones being put down could not be ascertained, except that there was a track on which carts might pass leading down to the sea-cliff, where there was a pathway in the direction of Broadstairs: he then stated, the inclosure of the way, and the placing of the stones, supposed to be in the centre of the Liberty-way as it originally run, and his impression that the way was a six feet one, and that, including the wall, two or three feet were between the wall and Mount Albion House. He said that he had had the principal entrance to Mount Albion House altered from the south-east to the north-west side, at the request of Lady de Ameland. He also proved that he knew for what the two payments of 2 *s.* 6 *d.* were made to the parish of Ramsgate and to the parish of St. Lawrence; and he had made those pay-

ments for several years both for Lady Augusta and for Mademoiselle d'Este, and they were continued down to the payments preceding the sale. Allason proved that Wightwick informed him of the claim to the way, and that the line was marked by stones, the whole of which he (Allason) thought he had comprehended in Victoria-road. Wightwick therefore had full knowledge of every circumstance from 1820, in which year he joined in the perambulation, down to the time of sale and of the execution of the conveyance. Direct, full, personal knowledge; not simply constructive notice. It was of course not required that he should be able to point out the exact width of the way. The complaint was that the knowledge which he possessed was not communicated to the purchaser, and that the abstract and map were calculated to mislead the latter; whereas it admits of no doubt that if the known facts had been communicated to the purchaser, he could have rescinded the contract. There are two circumstances of weight which appear to have escaped attention, viz. that the conditions stipulated that the purchaser should not inquire into the title to the roads; but for this stipulation, he would of course have inquired after the title to Victoria-road, in front of his house, and the deed of 1820, and the payments under it must have been disclosed. The conditions also reserved a right to the vendor to exclude the public from the new road, which of course rendered it necessary for the parish to insist upon their right to the whole of the old road. The decree of the Vice Chancellor appears to be the correct one, but by putting the case so much upon fraud, although he of course wholly acquitted the defendant of all direct personal fraud, the House of Lords appears to have been induced to look at it only in that light. The frame of the bill may readily be accounted for, regard being had to the correspondence before the bill, and the non-communication of the deed of 1820, or of the payments made under it. It could not be maintained that the purchaser might not have relief under the bill if he

proved a sufficient case, although nothing beyond neglect, or indifference to the rights of the purchaser, or fraud, so called in equity, might be proved: the charge of personal fraud not sustained, where not essential to the relief, may properly have an effect upon the costs, but not upon the merits. The case in the Lords appears to have been decided solely on the absence of deceit, on the absence of personal fraud on the part of the vendor, and on the want of sufficient knowledge on the part of her and her agents, and upon these grounds it is submitted that the judgment cannot be supported.

31. The Vice-Chancellor, as we have seen, relied upon the case of Edwards *v.* M'Leay generally, referring to the language of Sir W. Grant and Lord Eldon. In the House of Lords the Lord Chancellor said that case, which was principally relied upon, could not assist the purchaser, for there there was knowledge in the vendor, and a false representation, both of which were wanting in the present case, and he quoted the language of Lord Eldon in affirming Sir W. Grant's decree. Lord Brougham observed that both Sir W. Grant and Lord Eldon in that case went on the fact that there was direct knowledge brought home, therefore that did not help the plaintiff in this case. Lord Campbell said that there was no case of higher authority to be found in our law books: it was decided by Sir W. Grant on the most unexceptionable principles, and Lord Eldon stated the principle to be, "If one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, the Court will rescind the contract."

32. The case of Edwards *v.* M'Leay is imperfectly reported in Cooper (*c*), and upon the appeal the facts and arguments are not stated. The facts, as collected from the statement and the judgment, appear to be as follows:—In 1781 Mr. Thornton, the owner of a house at Clapham Common, separated a piece of ground from the common, and finally sur-

(*c*) 308; 2 Swanst. 287.

rounded the whole encroachment with a brick wall. In 1808 —27 years after this encroachment—Thornton sold to Malcolm, Prescott, M'Leay, and others, part of the fore-court and of the driving-way leading up to the house; and the whole of the ground upon which the coach-house and stables stood formed part of the encroachment [of course this did not appear in the conveyance from Thornton]. The purchasers from Thornton divided off a piece of land from the part enclosed and leased or sold it, and the lessee or purchaser had begun to erect four houses thereon. In May 1811 the purchasers from Thornton sold the house with the coach-house, stables, &c., to Mr. Edwards, and on the 25th of that month—30 years after the enclosure—conveyed the property to Edwards in fee. "Nothing appeared on the abstract which altered the nature of the case" (*d*). Soon afterwards Edwards discovered the defect in title, and filed a bill against the sellers: he charged that the sellers represented themselves to be seised in fee of the whole estate, and that they were aware of the circumstances, and not having disclosed the same to him were guilty of a gross fraud and imposition on him, and that he could not have discovered it from the abstract. The prayer was that the contract might be declared void with consequential directions. The sellers by their answer asserted *that it was since the filing of the bill that they for the first time had heard that the ground on which the coach-house and stables stand, &c., did formerly constitute part of the common.* But they admitted that *at the time of making the agreement with the plaintiff* they had heard it rumoured in the parish of Clapham that the piece of ground on which four houses (being no part of the messuage and hereditaments sold to the plaintiff) were built, had been part of the common: they made such representation of their being seised in fee, as was stated in the bill. Sir W. Grant thus stated their answer: "The defendants admit that they did make such representation as was stated with respect to

(*d*) See 2 Swanst. 288.

the whole of the premises—they say they do not believe that any of these premises ever did compose part of the common, but supposing the fact to be otherwise, they deny that such fact was within their knowledge. They admit that no such fact appeared on the abstract." The points on which the parties were considered to be at issue were these two. Was this at any time part of the common? Was it known by the defendants so to have been? The first point admitted of no doubt. Upon the second point "there was a considerable body of evidence, Sir W. Grant said, partly direct and partly circumstantial, tending to show that Mr. Prescott, one of the vendors, and who acted for the rest, must have known that this had been common, and had at different times been claimed by the parish as such." Prescott was an inhabitant of the parish from 1787: he was an active member of a parochial committee established in 1796 to guard against encroachments: in their book he was marked as present on the 1st June 1801, but there was no proof of his being there, when it was resolved that the part of the common taken in by Thornton be continued to the purchaser of his estate on his making application to the vestry after the sale, on signing the book as an acknowledgment, and paying a shilling a year to the parish. The description of the part taken in was proved to be the ground in question, but it was described in the resolution as the part of the common taken in by Thornton from the house occupied by Mr. Collick to Acre-lane. [It was not, therefore, referred to as forming part of the appurtenances to Thornton's house, and there does not appear to have been any proof that anything was done in consequence of this resolution.] It was further proved that in consequence of the erection of the four houses on the piece of land before mentioned, complaints had been addressed to Prescott by different persons on the subject of these erections, as being made on part of the common. The remaining evidence for the plaintiff was the evidence of one Copeland, who was employed by Prescott and Malcolm, two

of the vendors, to attend, and accordingly attended some vestry meetings in May and *June* 1811, relative to this encroachment. He informed them that the parishioners claimed all the ground in question as being taken from the common, and that they intended to perambulate to discover the trespasses committed by this enclosure and by others. Malcolm and Prescott then told the witness that the ground in question, with other land, were once part of the common, *but that the same had been enclosed so many years, the parish could do nothing with it, and that the same was as good a freehold as the other part of the estates.* The witness was present on Holy Thursday 1811 (I), at the perambulation, when the party passed over, and on the outside of the coach-house and stables, and stable yard and part of the fore-court, and *in a few days afterwards* he informed Prescott what the perambulators had done, *who told him that they had done wrong by going over the walls and going through the stable yard and part of the front court.* Sir W. Grant said that if a vendor knows and conceals a fact material to the validity of the title, he was not aware of any principle on which relief could be refused to the purchaser. He then stated the allegations in the bill, and the admissions and denial in the answer, and then examined the evidence upon the two questions at issue. The result, he said, of all the evidence on the second point was not indeed that Prescott knew of his own knowledge that this had been part of the common, or that he had with his own eyes seen the encroachment made, but *that he had so much information on the subject as made it altogether improper and unfair to represent to a purchaser,* as he and the other vendors did, *that they were seised in fee of every part of the property.* Be it that he entertained the opinion which he expressed, that after such a length of time the parish could not support the claim, did he or could he

(1) The 23d May, Coop. 315. The evidence is indistinct as to important dates.

believe that he and the other vendors had the same good title to this spot as against all the world as they appeared to have had in the ancient part of the estate? And supposing some of the information to have been acquired, as perhaps it was, after the representation had been made [of this there appears to be no doubt], was it fair to allow the purchaser to proceed to complete his contract on the faith of a representation, which the vendors at the time of such completion knew to be substantially untrue? The suppressed facts if disclosed would at all events have influenced the price, even supposing the purchaser might have been willing to run a risk with regard to the title. He concluded that he apprehended the Court was bound to relieve the purchaser from the state of hazard into which the misrepresentations had brought him. The decree declared that the sale and conveyance were *fraudulent and void*, and ordered them to be set aside, with consequential directions. Upon an appeal, Lord Eldon, C., observed that the case resolved itself into this question, whether the representation made to the plaintiff was not *in the sense in which we use the term* fraudulent? He was not apprised of any such decision, but he agreed with the Master of the Rolls, that if one party made a representation which he knew to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract. He therefore held the decree to be right.

33. Lord Eldon's statement of what he considered to be the principle of the decree cannot alter the facts of the case, and his own previous observation shows that he did not consider it a case of moral fraud, but one where, in the sense in which a court of equity uses the term, the representation was fraudulent. And such appears to be the real nature of the case. As there was no allegation of knowledge on the part of the sellers, when *they* purchased, it must be assumed that Thornton did not disclose to them the fact that part of offices, &c., were built on an encroach-

ment. The attempt to fix Prescott, one of the sellers, with knowledge in 1801, to affect him in 1811, seems to have failed, for in 1808, seven years after 1801, he and others purchased the very property, and appear to have accepted the title as a good one, and although an answer with a denial cannot stand against a witness and corroborative circumstances, yet they swore that it was since the filing of the bill that they for the first time had heard that the ground in question did formerly constitute part of the common, although at the time of making the agreement they had heard the rumour as to the ground upon which the four houses were built. The evidence of knowledge was, I think, quite sufficient to support the decree; but it also proved that the sellers *bonâ fide* believed themselves to have a good title after so long a possession, and indeed the title was one which it was highly improbable would ever be impeached. Sir W. Grant's position was, that if a vendor knows and conceals a fact material to the validity of the title, relief is to be afforded to the purchaser. That is the true rule. If the title is fairly before the purchaser, he must rely on his covenants. This rule does not require any representation. If the seller knows a material fact, and conceals it, that is, does not divulge it, he is responsible: his motive is unimportant; he is bound to give the purchaser the means of forming a judgment on the title, and is not to decide what he deems it necessary to disclose. But there was no document withheld, for none existed; it was a fact not disclosed. Sir W. Grant did not, like the bill, put the case as one of gross fraud, although, evidently, in the sense referred to by Lord Eldon, he declared the contract and conveyance to be fraudulent and void. But then it is said that there was a representation that the sellers were seised in fee, which was alleged by the bill, and admitted by the answer. There was no representation that no part of the property had ever formed part of the common: the representation alleged and admitted was, no

doubt, that which was proved by the contents of the contract, abstract, and conveyance, and which exists in every case, but which, where nothing is withheld, is confined, after the conveyance, to the relief to which the purchaser may be entitled under the covenants for title. There does not appear to have been any direct statement or averment in respect of the title, beyond what occurs in every case. The mere common form of the agreement, or the recital of a seisin in fee in the conveyance, would only express what is clearly implied in every such agreement or conveyance, without any recital. Where then is the distinction between this case and that of Gibson *v.* d'Este? In the latter case, as to knowledge, independently of the personal knowledge of the seller, sworn to by Wightwick, and her answer denying knowledge, but admitting the payments of the 2*s.* 6*d.* for so many years, which was not stronger than the answer in the former case, we have seen that, considering her as bound by the knowledge of her agent, she had full knowledge during the whole time of her possession, of the claim in question. And this was not a claim, like that in Edwards *v.* M'Leay, against which there was an adverse possession, with an intermediate sale, and time running for 30 years, but a claim acknowledged by a solemn deed, under which small rents, as an acknowledgment, had been paid for 18 years before and up to the time of sale. And here it was not a fact to be disclosed, which in the view of the seller and his advisers could not affect the title, but a solemn deed to be produced, which did and must impeach the purchaser's title, if any part of the land in question were left within his lot. Then as to representation: there never was a case in which there was a clearer representation that the seller was seised in fee of every part of the lot. The particulars of sale, the abstract, and the conveyance, with its condition to enclose the spot in question with a wall, amounted manifestly, in law and in fact, to a representation of a seisin in fee of every part of the property conveyed, and the answer corroborates this

view; but as in Edwards *v.* M'Leay there was no representation that there was no part of the lot common land, so here there was no representation that no part of the land to be enclosed was subject to a right of way; but in each case the absence of such an averment was immaterial; it was included in the representation of a seisin in fee of every part of the property. There is still another circumstance in Gibson *v.* d'Este which seems to have escaped attention, and which I have reserved for this place. Mademoiselle d'Este by the conveyance covenanted that notwithstanding any act done by her or by Lady Augusta, she was seised of all and singular the lands, hereditaments, mansion house, and premises conveyed of a perfect and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, qualification, restriction, matter, or thing whatsoever, expressed or implied, and which could revoke, determine, abridge, qualify, alter, charge, incumber, or prejudicially affect the same in any manner aforesaid, with the other usual covenants following. Now, can a more distinct representation of a seisin in fee not controlled by any deed executed by Lady Augusta be framed? It no doubt gave the purchaser a right of action, and that would have been his only remedy if the deed had been abstracted, but as all knowledge of the way over his lot, of the deed, and of the payments under it, was withheld from him, and as the spot in question was from its position essential to the enjoyment of the property, he was entitled to relief in equity. And that without imputing moral fraud to the seller, to which imputation of course all agreed she was not liable.

34. The Lord Chancellor particularly relied upon the case of Legge *v.* Croker, 1 Ball & Beat. 507, decided by Lord Manners, which was not quoted in the argument, and which was considered at the moment to be a decision by Sir A. Hart, C. Lord Brougham observed that he did not remember, in the course of his experience, ever to have seen two cases more nearly alike than the case referred

to and the present. It was quite a singular coincidence. If you change the names they are almost the same cases. Lord Campbell said that the guide on the other side was a case [Legge *v.* Croker] decided by a Judge of very great experience and very great intelligence, whose opinion on such a question was to be regarded with high respect (1). That case was the guide to show you what you ought to avoid. You may go as far as Edwards *v.* M'Leay, but then you are told how far you are not to go by the warning in the other case. After these opinions, it is with diffidence that I state that, in my view, the case of Legge *v.* Croker is distinguishable from the principal case, and is itself open to some observation. A high road formerly had run over the estate of Mr. Croker: in 1772 it was stopped as a high road by the presentment of the grand jury as having become useless, impassable for carriages, and dangerous to foot-passengers. Mr. Croker thereupon opened a quarry where the road had been, and in 1785 he ploughed up the road and inclosed the demesne with a wall: at that point where the old road had communicated with the high road, gate piers, and a lodge were built, and iron gates were put up and a small side door, which had a lock, an iron latch, and bolt. Mr. Croker's steward, who had lived with him from 1777, had positive orders from his master to keep the gate and *side door* locked, and general directions were given to the gatekeeper to lock the gate and side door every night; and this steward deposed in the cause that during the time he had lived with Mr. Croker there was no public passage through the lands, nor any claim or right of any made; but that the gatekeeper had orders to allow persons of decent appearance to walk through the grounds, and no person of that description was prevented walking there: the people went through the walks, as a walk of recreation, by the permission of the defendant or his servants, as was usual in gentlemen's demesnes. There was a gravel walk or path across the demesne in the

(1) This, I am told, was intended to refer to Sir Anthony Hart.

old direction. This is the view which Mr. Croker took of the case, and which was supported by the testimony of his steward. We shall presently see that there was conflicting evidence as to the right of footway. In 1808, the property having been advertised to be let, Colonel Legge entered into a treaty for a lease. On viewing the grounds, he observed the gravel walk or path, and inquired of Mr. Croker whether there was any public right of way there; and this question was, it seems, repeated more than once. Mr. Croker told him there was not; that there had formerly been a road in that direction, which, in 1772, had been stopped by a presentment of the grand jury, and from that period no right of passage had ever been claimed, that the footway then only existed by permission, and that he or the tenant could stop it up. In the result, Colonel Legge accepted a lease without any warranty as to the right to stop the footway: he then built a wall across the gravel-walk to prevent people walking across the demesne, upon which he was indicted for a nuisance in stopping the way: this indictment was tried in the King's Bench, and on the trial a right of way on foot, independent of the carriage road, having been proved, on the part of the prosecution, to have immemorially existed, Colonel Legge was found guilty. Mr. Croker assisted Colonel Legge's attorney in defending the indictment. Colonel Legge then filed a bill to be relieved against the lease as fraudulent, and charged knowledge in Croker that the public right of way existed when he wilfully misrepresented the fact (I). It was proved by the depositions of several witnesses for the plaintiff, that for 60 years back a right of passage on foot through the lands had been publicly

(I) The case was stronger than it is stated in the text, which I would not embarrass with statements not material to the point under consideration. Croker was an attorney, and was to prepare the leases free from expense. Colonel Legge reduced the heads of the agreement to writing, which stated, "that there was no liberty of passage to strangers or others through the lands except by the option or leave of the tenant:" the paper was delivered to Croker, but was not signed; the lease contained no warranty to that effect, and the first draft of it was perused by Legge's attorney.

and freely exercised by persons of all descriptions, that it was never thought necessary to ask the leave of the owner of the ground, and that Croker had never prevented or obstructed it; that the gate was always locked, but the side-door was in the daytime on the latch, and sometimes locked at night, but opened by the gate-keeper when applied to. Lord Manners, C., said, if it were a wilful misrepresentation, the plaintiff might be entitled to relief, but where the parties have expressed their meaning by a lease, that has been with due deliberation executed, and where there is no wilful misrepresentation, nor any mistake in omitting to introduce a covenant respecting this right of way into the deed, it would be very dangerous to correct this deed upon such slight grounds (I). Croker conceived himself to be, in point of law, justified in asserting that there existed no right of way after the presentment by the grand jury, and to be warranted, in point of fact, when, after having erected gates, having directed his servants to prevent people passing, he found it acquiesced in for so many years. This could not be called a misrepresentation, and not being introduced into the draft or the lease, it constituted no part of the agreement. The Chancellor added, that the case appeared to him to bear some resemblance to the sale of a horse, where the vendor says he believes the horse to be sound, but will not warrant him; now to make him liable the purchaser must prove the *scienter*, which is the gist of the action;

(I) This is a proposition well founded in law, but the Lord Chancellor Manners observed that the right of carriage way was abated by the presentment. Croker was in possession a length of time, upwards of 30 years; he put up gates; he gave directions to his servants that no person should pass without his permission. Was not that strong evidence of an interruption acquiesced in, and was not that of infinitely more weight in a question of right of way than evidence of usage? From these observations the Chancellor, it would seem, attached no weight to the evidence of the existence and free use of the footpath without asking for leave, and of the opening of the door when locked at night, and a passenger required it. He disposed of the result of the verdict by observing that if Legge brought an action of trespass it would not bind him, but that was no answer to the plaintiff, who used it as evidence of the existence of the footway as matters then stood.

that at the time he asserted he was sound he knew him to be unsound. So here Mr. Croker says, that in his opinion the fact is so, and assigns the reasons for that opinion; and when the lease is prepared this is not followed up by a covenant to that effect. The case would have been materially different if wilful misrepresentation or omission had been made out; it was sufficient for him to say they formed no part of the case before the Court.

35. Now as to the two cases: In Gibson *v.* d'Este there was no knowledge on the part of the purchaser that any right of way had ever existed over the lot sold to him; there was no present exercise of it; but as there was no communication on the subject with the seller, there was no averment by her or her agents that no such right did exist; whereas in Legge *v.* Croker, a larger right than that which was at the moment exercised had existed; the footpath was still used; and the path itself was an object of sense, it attracted the lessee's attention, and his inquiry was answered by the owner's assertion that the carriageway was gone, and the footway existed only by sufferance. Lord Manners, whether correctly or not, thought that Croker was not guilty of misrepresentation, and accordingly decreed that the lessee having taken the lease with knowledge of the existence of the path, and having relied upon the representation of Croker, who acted *bonâ fide*, and not having chosen to inquire further, or to require any warranty, was not entitled to relief. It might have been urged that Croker's direction to admit all persons to pass, was well adapted to prevent a claim of right; and the statement that the side-door was locked at night, was countervailed by the proof that it was opened when called for. But the present object is not to consider whether the facts authorized Lord Manners' decision, but to consider whether the case, as it stands, authorized the reversal of the decree in Gibson *v.* d'Este; and it is submitted that it did not.

36. In the case of Harris *v.* Kemble (*e*), the complicated

(*e*) 1 Sim. 111; 5 Bligh, N. S. 730; 2 Dow & Cla. 463.

facts of which it would be useless to state, the bill was filed by Harris, the owner of some shares in Covent Garden Theatre, against the owners of other shares in the theatre, who under the agreement had been two years in possession, and had obtained the management from Harris, for which he had had 1,000 *l.* a year, to enforce a specific performance of an agreement for a lease at a large rent, and Sir John Leach, V. C., who bestowed great pains and much time upon the case, decreed a specific performance. The defence rested principally on alleged misrepresentations by Harris, independently of a question as to the defendant's knowledge of a prior deed of arrangement. The Vice Chancellor was of opinion that there was no concealment of the deed, and that as it was executed by the party under whom the defendants claimed their own shares, they were bound by it. He held that the alleged misrepresentations of the amount of permanent savings was not made out, nor was that of the amount of profit established. The most important charge of misrepresentation was that as to a box which in the lifetime of Harris's father had been let for alternate weeks at an annual rent of 210 *l.*, and he and his father assigned the other moiety or weeks of this box to Sir E. Antrobus, for 2,625 *l.*, which was wholly received by his father: the transaction was represented to their co-proprietors as a lease to Antrobus for 21 years, at 210 *l.* a year, the same as the rent paid for the other half of the box, and the father and son in succession accounted for the rent of 210 *l.* as if paid. Upon the agreement for letting the theatre, Harris still represented the box as let at 210 *l.* a year, which by the agreement he himself was to receive, with other rents, as a loan, until the debts of the theatre, which were to be paid out of all the profits, were discharged. The Master of the Rolls considered the transaction extremely incorrect, but showed by the tables that Harris paid by the 210 *l.* more than the value of the price obtained for the box. The concealment, he said, could not be made to bear upon

the validity of the agreement for the lease. Harris represented the box as let for 210 *l.* a year, and as far as it regarded the defendants, it was to be considered as let at that sum, Harris being bound to account with his co-proprietors for that rent, and his interest in the theatre being a full security for the payment of it, and unless the defendants could show that their interest as lessees were prejudiced by that concealment, it must be indifferent to them whether the 210 *l.* was accounted for by Harris or Antrobus. If the defendants preferred their proportion of the price to their proportion of the rent, there was nothing in the agreement to prejudice that question. Upon an appeal, Lord Lyndhurst, C., differed from the Master of the Rolls on every point, and dismissed the bill. In regard to the principal objection, he said that Harris was aware of the fraud that had been practised, and did not disclose it to the parties with whom he was dealing; on the contrary, this box formed a part of the property meant to be transferred by the agreement, and he believed it was a principle established in equity, that where a party calls for a specific performance of a contract, he must, as to every part of the transaction, be free from any imputation of fraud or deceit. It was not sufficient that compensation might be afforded; it was not sufficient to say that security might be given in some other way, or that security might be obtained upon the property; fraud was a personal bar to a proceeding of this kind. Upon an appeal to the House of Lords, this decree was affirmed, upon the motion of Lord Brougham, C., Lord Plunket and Lord Lyndhurst concurring. The Lord Chancellor and Lord Plunket stated, in a few words, that Harris had been guilty of misrepresentation, and therefore could not compel a specific performance. It is a case, nevertheless, upon which opinions will probably still differ.

37. In Brookman *v.* Rothschild (*f*) a seller, who was also a buyer, was relieved against sales and purchases and

(*f*) 5 Bligh, N. S. 165; 2 Dow & Clark, 188; 3 Sim. 153.

resales and repurchases of French rentes and Prussian bonds, upon the ground that the purchase of the rentes was made by the person himself whom he employed to sell them, and who charged commission, &c. on the sale, that is, he sold them to himself; and that on alleged repurchases, which were regularly charged for, none was actually made; and upon alleged resales, which were accounted for as if the rentes had been sold in various amounts and at various prices, none was made; but the agent himself was the purchaser or seller according to the nature of the dealing, and it was a transaction upon paper. The bonds belonged to Rothschild himself, as the contractor, and he held a large amount of them, but he set apart none for his principal upon the purchases. The purchaser was not aware that the purchases and sales were not contracted with third persons in the regular way of dealing, but the market prices, on the whole, appear to have been given and obtained in account on every transaction. Sir L. Shadwell, V. C., relieved the purchaser from all these pretended sales and purchases, and upon an appeal to the House of Lords the decree was affirmed, with 100 *l.* costs, upon the motion of Lord Wynford and with the concurrence of Lord Brougham, C., without calling upon the respondent's counsel. The principle of the decree seems to be right, but from the novelty and the very complicated nature of the case it was considered a subject of regret at the time that it did not undergo more examination in the ultimate court of appeal.

38. There is another case of a pretended purchaser and seller of a very different character (*g*). Wilson, an uncertificated bankrupt, contracted for an estate for a large sum, and then sold the benefit of the contract to King for a bonus of 3,000 *l.*, and the owner of the estate cancelled the contract with Wilson and executed a new one to King at the original price, and the sale was afterwards duly completed between them. In order to secure the 3,000 *l.* to Wilson apart from

(*g*) Staley *v.* King, 3 Cla. & Fin. 131; 8 Bligh, N. S. 716.

his creditors, King gave to a person named Kemp an undertaking in writing, signed by King, in these words: "Mr. Kemp, when the title to the Philpot-lane estate is perfected and the same shall be regularly conveyed to me by all the parties, I will be accountable to you for the sum of 3,000 *l.*, upon receiving a proper release from you and Mr. Wilson for the same." Kemp filed a bill against King and against the assignee of Wilson, praying for the payment of the 3,000 *l.*, for which purpose he stated that he (Kemp) himself originally contracted for the purchase, and afterwards sold his equitable interest for 3,000 *l.* This he did not prove, and as the contrary was inferred from some correspondence which was proved, the Vice Chancellor dismissed his bill with costs. Lord Brougham, C., upon an appeal, dismissed it with costs; and upon an appeal to the House of Lords his decree was, upon his own motion, affirmed with costs.

39. The cases of Champernown *v.* Brooke and Brooke *v.* Champernown turned upon the period from which a seller of a reversion is entitled to interest on the purchase-money, and upon a claim by the sellers to an allowance for the wearing of lives, but it was properly decided upon the terms of the contract (*h*). By the contract the title was to be made out by the 1st of May 1813, when the conveyance was to be made, and the purchaser was to be entitled to the rents and profits from that 1st of May, or from such time as the purchase should be completed. The residue of the purchase-money was to be paid on or before that 1st of May, and the sellers were to receive such sums for the increased value of the estate by or in consequence of the deaths of any persons since the 29th September 1811 for whose lives any of the estates were granted, as should be ascertained by arbitrators; and the purchaser was to be paid interest on a sum which he had paid down in excess of the

(*h*) 3 Cla. & Fin. 4; 9 Bligh, N. S. 199; 4 Cla. & Fin. 589; 3 You. & Coll. 510, 511.

deposit agreed upon. By the decree in the cause the usual reference was made as to title, and the Master was to inquire how much the value of the estate had been increased by the deaths of persons holding for lives. After a long litigation it was established that the title was a good one, and that the sellers were able to make such a title before the commencement of the suit, but that a good title was not shown until several years after the contract (*i*). Upon an appeal to the House of Lords, the sellers insisted that they were entitled to interest from 1st May 1813, and that the purchaser was entitled to the rents and profits, including the increased value from the dropping and wearing of lives from that period, and therefore that the inquiry directed by the decree as to the dropping of the lives ought not to have been extended beyond the period that elapsed from the 29th September 1811 down to the 1st May 1813, but if such inquiry should be held to be correct, then they submitted that the inquiry should be extended to the *wearing* of lives, and the increase of the ages of the persons for whose lives any part of the estate was held on the 29th September 1811, as well as the dropping of the lives; but Lord Cottenham, C., was of opinion that the contract excluded the claim set up for interest, and provided that the vendors were to have the rents until such time as by their contract it ought to be completed, so far at least as they were concerned. If the purchaser had improperly delayed the completion of the contract to gain an improper advantage, that was a matter for the Court to set right in the progress of the cause. And he held that the contract equally excluded that benefit which the vendors sought to have from the increased value by the wearing of lives. The decree gave all the benefit which the contract gave; it directed the Master to inquire what had been the increased value from the dropping of lives; it was silent as to interest, and as to any increased value from the wearing of lives. The decree was, upon the motion of the Lord Chancellor, affirmed.

(*i*) Sugd. Purch. 802.

40. Between the original decree and the hearing in the Lords above referred to, an order had been made in the cause by Lord Lyndhurst, C. B., upon a petition, it being too late for a rehearing of the decree, which he thought was erroneous, that the Master should inquire generally how much the value of the estate had been increased by the *wearing* of lives, or increase of the ages of the persons for whose lives any part of the estates was held. Upon an appeal to the House of Lords this order was reversed for irregularity, but Lord Brougham and Lord Lyndhurst, C., both considered the order as correct upon the merits, without reference to the conduct of the purchaser, upon the ground that the purchaser could not have the benefit of an increase in the value of the estate without paying interest: it was admitted that if the amount of interest exceeded the increased value, the purchaser would only have to pay so much as was equivalent to the increased value (*k*). But this view of the case was of course overruled by the ultimate decision of the House, affirming the decree.

41. If upon a purchase the estate is conveyed by the direction of the purchaser to a trustee for him it will require very clear evidence on the part of a third person to establish an interest in the estate in common with the purchaser (*l*).

42. In the case of Sheehy *v.* Muskerry (*m*), already fully considered, a point arose whether a seller of an estate subject to a lease could, after the conveyance to the purchaser himself, impeach the lease for his own benefit. Sir E. Sugden, C., thought he could not. Lord Plunket, C., was of the contrary opinion, but in the result the point was not decided by the House of Lords.

(*k*) 3 Cla. & Fin. 4; Sugd. Purch. 803; for further proceedings, see Townsend *v.* Champernowne, 3 You. & Coll. 505; the matter, it seems, was compromised. See Sugd. Purch. 804, n. Sheppard *v.* Watherston, 5 Dow, 278, as to a purchaser's right to a crop under an express stipulation, was decided upon the law and custom of Scotland.

(*l*) James *v.* Price, 5 Bligh, N. S. 419.

(*m*) See *supra*, p. 465; and see Sugd. Purch. 1034.

43. Where an estate was subject to an annual rent-charge, and part of it was sold subject to the annuity, it was decided in the House of Lords, reversing a decree of Lord Plunket's, that the part sold was not subject exclusively to the whole of the rent-charge, but only to its due proportion with the rest of the estate (*n*). Such a question cannot often arise, because there are few contracts so imperfectly framed as to leave it in doubt whether the property sold is to bear the whole, or a part only, of a common burden on an estate of which that only forms a portion. In the case referred to the sale was under a decree, and no conditions were published, but the Master stated "that the lots were subject to an annuity of 300 *l.* a year for the life of Mrs. E. Chartres, then aged near 60 years." Great irregularities took place although they were not made the ground for relief on the appeal—the plaintiff, an incumbrancer, at whose instance the property was sold, became the purchaser without the leave of the Court, and then declared himself a trustee of a great part of the lot for his solicitor in the cause. Lord Plunket, C., as no agreement could be established for the purchaser's liability to the whole of the annuity, directed inquiries into the value of the property sold, and the result satisfying him that the lot must have been purchased, as being subject to the whole of the annuity, he made a decree accordingly, but it was held in the House of Lords, upon the advice of Lord Cottenham, C., in which Lord Campbell concurred, that no agreement existed for the purchaser to bear exclusively the whole of the annuity, and that such an agreement could not be made out by ascertaining that the lot was worth more than the price paid for it, although made liable to the whole of the annuity, nor could such an agreement be presumed, because it was alleged if there was no agreement there was fraud; in the absence of all evidence no agreement could be presumed upon any such ground.

44. Where a life annuity is granted with a power of repur-

(*n*) Siree *v.* Kirwan, 9 Cla. & Fin. 716.

chase, it is in effect a loan, and the right to repurchase ought to receive a liberal construction in order to enable the borrower to repay the loan, and relieve himself from the heavy rate of interest payable in the shape of an annuity. In Joy *v.* Birch (*o*) an annuity for lives had been granted, and the deed provided that if at any time after a given day the grantor (Colhoun), his executors, administrators, or assigns, should be desirous to repurchase the annuity, and of such his or their intention should give unto the grantee (Joy), his executors, &c., 12 calendar months' notice in writing under his or their hand or hands, then Joy should at the end of the 12 months, on receiving all arrears, accept 2,000 *l.* in full for the repurchase of the annuity, and would at the costs of the grantor release the annuity. Colhoun, the grantor, had given a power of attorney to two attornies to act generally for him: they gave a written notice under the power to Joy personally on behalf of Colhoun. On the day mentioned in the notice two solicitors attended at Joy's town residence, for the purpose of tendering the purchase money and costs and deeds of transfer, but they were informed that he was at Guernsey or Jersey, and thereupon they left a written notice of their attendance and the object of it, and that the money and costs and deeds would remain at the office of the solicitors, in Gray's Inn, for 10 days, for the purpose of being paid over to him, when he should apply for the same and execute the deeds. These were the simple facts, but the case became a complicated one in consequence of Colhoun having contracted to sell the estate to Birch, and having subsequently transferred the estate itself to Joy upon trust to sell and pay off incumbrances and to pay the surplus to Colhoun, and having afterwards assigned the balance of the purchase money to him, in order to secure the money due to him on an account stated, and by reason of subsequent dealings and correspondence between Colhoun and Joy; but the case was decided upon the invalidity of the notice to repur-

(*o*) 4 Cla. & Fin. 57; 10 Bligh, N. S. 200.

chase. Joy by his answer insisted that the attornies who gave the notice had no right to act, as he had himself obtained an irrevocable power of attorney to act in Colhoun's affairs, and that the notice was of no avail as it was not under Colhoun's own hand. The cause was in effect heard upon bill and answer. In the first instance, Sir John Leach, V. C., held the notice a valid one, and decreed that the annuity had ceased on the day when the notice to repurchase expired, and upon an appeal, Lord Brougham, C., affirmed the decree. But upon an appeal to the House of Lords the decree was reversed. Lord Plunket appears to have supposed that Birch, as the purchaser, had no right to redeem the annuity as only one life remained, and Colhoun might choose to keep it on foot; but as this was not the ground of the reversal, this point requires no further notice. Lord Devon held that the notice could not be deemed a notice upon which payment could then be made, but admitting the notice to be valid, he did not think that what had passed amounted to anything like payment. Something, he said, ought, to make a tender payment, to be done which showed that he to whom the money was to be paid had distinct notice of the intention to pay at a certain time and place, and that it was his default that he did not receive the money. Lord Lyndhurst did not give any opinion as to the right to give the notice under the power of attorney. He thought the service of the notice was a regular legal service, but he did not think that the subsequent proceedings were operative to extinguish the annuities; but he did not state upon what grounds he came to that conclusion. Lord Cottenham, C., held that the terms of a power to repurchase should be strictly complied with; he relied upon the nature of the admission in the answer. The notice, he observed, was entirely silent as to the place where the money was to be paid, and the provision in the deed was the same, but it was a well established rule that where that is the case, it is incumbent on the party giving the notice of the intention to

repay to specify the place at which he intends to make the payment. There was besides an omission of all the facts which go to constitute a legal tender; the fact admitted, and the only fact admitted, being that the party left the paper at the house of Mr. Joy. But there was another circumstance; the payment to be good must be accepted by the execution of a deed. There was no statement, and therefore there could be no proof, that any previous step had been taken to inform Joy of the nature of the deed which he was to execute; yet in Wiltshire *v.* Smith, 3 Atk. 89, it was decided not only that a deed must be prepared and tendered, but that the party may refuse to receive the money and to execute the deed till he has had the opportunity of advising with his attorney whether he may safely execute it (I). These were not the grounds upon which Joy rested his defence. The case was not perhaps disposed of in a manner altogether satisfactory; but it should make borrowers on annuity careful in stating a place at which they will on the day named attend to pay the repurchase money, and it proves how dangerous it is to rest a case on qualified admissions in the answer.

45. A contract for sale, even where there has been a decree for performance of it, may be abandoned or waived by long delay, and by dealings between the seller and the purchaser, treating the former as still the owner of the property (*p*).

46. Lord Eldon, C., in Lord Rancliffe *v.* Parkyns (*q*), observed, that if a man buys an estate, and a bill is filed, and a title shown to relief, he may plead that he is a purchaser for valuable consideration without notice, and he must support his plea by denying all the circumstances from which

(*p*) Lord Rosse *v.* Sterling, 4 Dow, 442.

(*q*) 6 Dow, 230; and as to equitable protection, see 2 Dow, 532, 533.

(I) The notice stated that the drafts of the deeds of transfer had been submitted to Messrs. Amory & Cole, Joy's solicitors, for perusal on his behalf.

notice may be implied; and if, after all that can be said to charge him with notice, he is hardy enough to swear that he had no notice, and to deny all the circumstances, and he does plead, and refuses to try the question in any other way, then it must rest very much with his own conscience. But if he forbears to plead, and if it turns out in the progress of the suit that he was a purchaser for valuable consideration without notice, it was too much to deprive him of the effect of that, merely because he did not stop the suit at first, if it be so in fact.

47. Where a tenant for life of estates demised them for a term of years to trustees, to pay him 10,000 *l.* a year for life, and then to form a fund to pay his creditors, and a creditor filed a bill (I) for an account and a receiver, and a receiver was accordingly appointed, and a decree made for the account, and an injunction was issued restraining the grantor from receiving any of the rents, and yet he kept possession and received the rents, and some years after the execution of the trust deed, upon his son's coming of age, joined with him in resettling the estates, so as to make his son a purchaser of a portion of the 10,000 *l.* a year, which portion the son settled on his marriage, and otherwise disposed of. After the lapse of some years the creditors gave effect to their proceedings, and insisted that they were entitled to appropriate the 10,000 *l.* a year as against even the purchasers (the son and those claiming under him) to satisfy the rents which the grantor had improperly received, notwithstanding the receiver and injunction, but Lord Plunket, C., decided against their claim, and his decree was, upon an appeal to the House of Lords, affirmed with costs, upon the motion of Lord Cottenham, C. (*r*).

48. A co-owner of property may of course agree that his

(*r*) Houlditch *v.* Wallace, 5 Cla. & Fin. 629; 1 Dru. & Walsh, 461.

(I) The estates were in Ireland, and the receiver was appointed in England. This led to delay, and embarrassed the cause.

copartner may sell the whole of the property at what price he thinks proper, accounting to him according to a certain scale for his share, and if the nature of the arrangement be such as to show that he was to look to the copartner only for the amount, the purchaser from the latter, although aware of the interest of the other, may pay the purchase-money to the partner authorized to sell, and the other partner will have no lien on the property, or claim against the purchaser, or against an indemnity fund set apart to secure the purchasers from his claim for the amount due to him (*s*).

49. A sale of an advowson or of a next presentation is valid, although the incumbent is *in extremis*, to the knowledge of both seller and buyer, where the parties have not any particular clerk in view; and it is unimportant that the incumbent actually die a few hours after the execution of the deed. The right to sell the presentation continues as long as the incumbent is in existence. This was decided in the House of Lords upon the opinion of the Judges, reversing the judgment of the Court of King's Bench (*t*) (I).

(*s*) Pinkus *v.* Ratcliff Gas Light Company, 1 H. of L. Cas. 309.

(*t*) Fox *v.* Bishop of Chester, 1 Dow, N. S. 416; 3 Bligh, N. S. 123; 2 Barn. & Cress. 435.

(I) Where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to the personal representative. Mirehouse *v.* Rennell, 1 Cla. & Fin. 527. Although a charge upon a benefice in Ireland be void under the statutes, yet a collateral security by bond may be valid. Wynne *v.* Robinson, 4 Bligh, N. S. 27. See Robinson *v.* Wynne, Hayes, 336; Wise *v.* Beresford, 3 Dru. & War. 277. Norbury *v.* Meade, 3 Bligh, 211, may be referred to upon the jurisdiction of equity in suits for tithes, and upon lay impropriations and exemptions from tithes; and see Holdsworth *v.* Fairfax, 3 Cla. & Fin. 115. Cases on tithes have not been inserted in this review, in consequence of the late Acts for the commutation of them.

SECTION II.

OF THE TITLE.

1. *Jenkins* v. *Herries: appeal upon exception as to title overruled, ordered to stand over for cause to be heard upon further directions.*
2. *Observations on the order.*
3. *Purchaser discharged for want of title.*
4. *Blosse* v. *Lord Clanmorris: so where title doubtful: effect of recovery on reversion in the Crown.*
5. *Wise* v. *Ponsonby: notice of Crown rent binding.*
6. *Purchase under land tax Acts: money retained by the common solicitor, no relief against the seller although he took a security for the money from the solicitor.*
7. *Purchaser of equitable interest must give notice to the trustees to secure his title.*

It now comes in order to consider the questions which have arisen upon title.

1. In Jenkins *v.* Herries (*a*), where Sir John Leach, V. C., overruled an exception to the Master's report in favour of the title, being of opinion that an estate tail passed under the will in question, there was an appeal to the House of Lords from this order, and the House, upon the motion of Lord Eldon, C., without deciding the point of law, directed the appeal to stand over until the cause had been heard on further directions in the court below, with liberty to the parties then to apply to the House as they might think fit. The Lord Chancellor said that he considered that before the House should be called upon to give its final judgment, the Court of Chancery should decide by a decree whether the title was so clearly good and marketable as to be binding against an unwilling purchaser, and if the Court should decide in the affirmative and decree a specific performance, then the House of Lords must give the final judgment on the

(*a*. 4 Madd. 67; 6 Sim. 168, n.; Printed Cases, D. P. 1820. I was of counsel for the respondent.

subject; but if in the negative, it might be unnecessary for the House to decide the question.

2. This was a singular order, and it was founded upon the disinclination of the House to force the title upon the purchaser. For although the court below certainly might refuse a specific performance upon the hearing upon further directions, yet that could hardly be presumed, for in overruling the exception the Court in effect decided that the purchaser was bound to accept the title. The Court in a suit between a vendor and purchaser does not, even upon exceptions, decide strictly upon the abstract point as between ordinary litigants, but upon the nature of the title being such as a purchaser could be compelled to accept. And if Jenkins *v.* Herries, for example, had been set down before the court below for further directions as well as upon the exception, the Court after overruling the exception would without any further argument have decreed a specific performance. Notwithstanding the order in Herries *v.* Jenkins, it would not be safe for a purchaser who objects to a decision upon exceptions in favour of the title to wait until the decree is made for further directions before he appeals, for he would probably have to pay the costs incurred subsequently to the hearing upon the exceptions although his appeal should be successful. It is difficult not to be too early or too late (*b*). It seems impossible to justify the order of the House. The House of Lords in such a case sits as a court of equity, and as the court below is bound to decide upon the exception, although the cause is not set down on further directions, and never may be, and as the suitor has an undoubted right of appeal to the House of Lords from the order made, it really is a denial of justice to refuse to decide the question of law and compel the parties to go back to the court below to have the case heard upon further directions. In the case under discussion no further proceedings were had.

3. A purchaser whether under a sale by the court or by

(*b*) This is extracted from Sugd. Purch. 511.

contract out of court will be discharged if a good title be not made. In O'Connor *v.* Kirwan (*c*), the purchase was made in the Master's Office in 1815; there were many objections to the title, and the Master made no less than seven reports on incumbrances and title, and finally in May 1820, on cross notices, the Master of the Rolls of Ireland refused the purchaser's motion to be discharged from the purchase, with costs, without prejudice to such application as he might make to have a recovery suffered, and ordered him to bring his purchase money into court. This order was affirmed upon appeal by Lord Manners, C., but upon an appeal to the House of Lords the orders were reversed, and the House declared that considering the objections to the title, the Court of Chancery ought to have discharged the appellant from his purchase, on his application to be discharged, and he was discharged therefrom.

4. In Blosse *v.* Lord Clanmorris (*d*) the purchase was made under the decree, and the title depended upon the operation of a recovery in barring a reversion vested in the Crown by forfeiture. This was held to be a sufficient objection (I), but the sellers obtained an order from the Master

(*c*) Printed Cases, D. P. 1824. I was of counsel for the appellant. See Kirwan *v.* Blake, 1 Hog. 151, upon the purchaser's application to obtain the stock in which his money had been invested. Ball *v.* Beresford, Printed Cases, D. P. 1824, which cannot, I think, be useful as a precedent. I was of counsel for the respondent.

(*d*) 3 Bligh, 62.

(I) A few questions have been decided during the period of this review on the rights of the Crown. The Judges gave their opinion on some important points regarding grants of markets, and the user of them, in the matter of the Islington Market Bill; 3 Cla. & Fin. 513. A grantee under the Crown may lose his right by non-user for a great length of time, without reference to the general question as to the validity of the grant; Parmeter *v.* Attorney-General, 1 Dow, 316; where length of time had rendered it difficult to show that the place in question was part of the ground comprised in the grant. A grant by the Crown to a corporation of a borough and pier quay, willing that they should repair the buildings, banks, and sea-shores, &c., if accepted by the corporation, will impose upon them the condition to repair, and being an obligation of general and public concern, an indictment will lie for a

of the Rolls of Ireland referring it to the Master to ascertain what acts would make a good title, and within what time it could be completed; and the Master reported that a grant from the Crown or a private Act of Parliament would confer a good title, and that the one or the other might be obtained in the next Session of Parliament. The report was confirmed, and then the sellers appealed against the order, *that the title was a bad one*, and Lord Manners, C., affirmed the order. They then appealed to the House of Lords against the original order and the Lord Chancellor's order affirming it. Lord Eldon, C., said that he could not advise the House, sitting as a court of equity in appeal, to hold a purchaser to the contract in a case where it could not be stated, as a matter free from doubt, whether the reversion had been barred by the recovery; and as the purchaser had been brought into court upon a doubtful title, he ought to be discharged with costs. Lord Redesdale concurred. The order was, that it appearing to the Lords that the title offered to the purchaser at the date of the Master's report upon the title was not such as a purchaser was bound to accept, it was adjudged that the appeal should be dismissed and the orders complained of be affirmed, with 250 *l.* costs. It will be observed that as there was no cross appeal against the order as to the mode of making good the title, that order remained undisturbed. It is certainly much to be regretted that the House of Lords ever admitted this doctrine of a doubtful title, because although the House cannot bind absent parties, yet a decision by the Lords of

breach of it, and an action by individuals peculiarly injured by non-repair. Mayor, &c. of Lyme Regis *v.* Henley, 2 Cla. & Fin. 331; and see Mayor, &c. of Galway *v.* Attorney-General, Printed Cases, D. P. 1835. In Scarlet *v.* Governors of Lucton School, 4 Cla. & Fin. 1, the House put a construction on an ambiguous grant from the Crown of tithes of a manor which formed part of a rectory. Lands formed by gradual and imperceptible deposit on the sea-shore belong to the owner of the adjoining lands, and not to the Crown. The King *v.* Lord Yarborough, 2 Bligh, N. S. 147; 1 Dow, N. S. 178.

a point of law is binding upon all inferior courts, and they have ample means, with the assistance of the Judges, of coming to a safe conclusion upon what the rule really is (*e*). It is not too late to retrace their steps.

5. In Wise *v.* Ponsonby (*f*), where the sale was also under a decree, the Master reported in favour of the title, to which report the purchaser took several exceptions, some of which were overruled by Lord Manners, C., upon the plaintiff's undertaking to procure the concurrence of the persons whose outstanding interests were the grounds of those objections. An exception for that it appeared that the lands purchased by him were subject, amongst others, to a Crown rent of 76 *l.* and a fraction yearly, and no sufficient apportionment had been made of it, and the lands were still subject to the entire rent, was overruled on the plaintiff's undertaking to allow the appellant 20 years' purchase for the part of the Crown rent allotted by the order of the Court of Exchequer, (which order, it appeared, had been obtained for that purpose,) upon the lands sold. From the order there was an appeal to the House of Lords. The Master's sale-book was silent as to the Crown rent, but it was proved by affidavits that the estates were sold subject to it, and that it should be apportioned according to the rates of purchase, and notice at an early period was brought home to the purchaser by the abstract of title which mentioned the rent, and by the observations of his counsel thereon. The apportionment was made long after the sale. The appeal was dismissed and the order complained of affirmed.

6. A purchaser will not obtain a title under the Land Tax Redemption Act, unless his money be actually paid into the bank, and in Hicks *v.* Morant (*g*), where the money

(*e*) See Sugd. Purch. 510.

(*f*) Printed Cases, D. P. 1825. I was of counsel for the appellant.

(*g*) 3 You. & Jerv. 286; 5 Bligh, N. S. 643; 2 Dow & Cla. 414. I was of counsel for the appellant. See for the remedies given to a purchaser under the Act, by Parliament, Sugd. Purch. 1003; and see Laurie *v.* Laurie, 2 Dow, 556.

was paid to the common solicitors of the owner and the purchaser, and was not invested, the purchaser was denied relief against the owner, the sale having been made during his infancy, notwithstanding acquiescence and a security taken by the owner long after he attained 21, from the attorney, for the purchase money; but the owner offered to give to the purchaser the benefit of the security so taken. It was a case of considerable difficulty. Lord Brougham, C., in moving the affirmance of the decree, relied principally on the purchaser's knowledge that the money had not been paid into the Bank since he continued paying the land-tax on the lot purchased by him. It may be doubted whether sufficient weight was given to the acts of the owner, who was equally aware that the money was not paid, and took a security for the money from the attorney five years after he came of age, in which the money was treated as a debt due to him from the attorney, and he gave him a day for payment of it, and reserved his right against the purchaser, and ultimately accepted from the solicitor a release of the equity of redemption, and released him from the above mentioned and other monies secured to him by the attorney, and did not make any claim against the purchaser until 16 years after he came of age, and the claim was made a year *before* he accepted and gave the releases before mentioned.

7. So a purchaser of an equitable interest, until he gives notice to the trustees of the legal estate of the conveyance to him, has not done everything that is necessary to complete his title. Where the legal estate was vested in trustees by father and son, to sell and pay incumbrances, and then in trust for the father for life, and afterwards for the son, in fee, and the son in his father's lifetime first granted annuities for lives, and then made a mortgage in fee, and the mortgagee having no notice of the annuities, gave notice to the trustees of his mortgage between four and five years after it was executed; he was held by Sir John Leach, Master of the Rolls, to have priority over the annuitants who had

not given notice to the trustees, and his decree was affirmed upon an appeal to the House of Lords, upon the motion of Lord Lyndhurst, supported by Lord Brougham (*h*).

(*h*) Foster *v.* Cockerell, 3 Cla. & Fin. 456; 9 Bligh, N. S. 332; 1 Myl. & Kee. 297, *nom.* Foster *v.* Blackstone.

SECTION III.

OF PURCHASES UNDER A DECREE.

1. *Void for fraud, Gore* v. *Stackpole: purchase by attorney.*
2. *Lord Clare's decree as to a purchase by a stranger, with observations.*
3. *Observations on Gore* v. *Stackpole in a later case.*
4. *Colclough* v. *Bolger: sale subject to invalid leases and to annuities granted by the tenant for life, with money paid to him, and leases afterwards granted to his agent, void.*
5. *Observations thereon.*
6. *Colclough* v. *Serum, the same relief against another purchaser.*
7. *Observations thereon.*
8. *Mullins* v. *Townsend, bribe to tenant for life and agent not to open biddings on purchase by plaintiff, void.*
9. *Lord Bandon* v. *Becher: irregular sales deemed fraudulent.*
10. *The sales and proceedings in that case.*
11. *The decree and affirmance.*
12. *Observations thereon.*
13. *Compensation decreed against assets of tenant for life for present value of lands settled for value.*
14. *Observations thereon.*
15. *Townsend* v. *Warren, irregular sale not set aside, but full value at the time to be made up: sale in substance out of court, money paid to tenant for life.*
16. *Observations on the money paid to the tenant for life.*
17. *Leases by the purchaser after the sale to the tenant for life and his nominee, and decree.*
18. *Observations on the decree.*
19. *Affirmed in D. P.*
20. *Observations thereon in a later case.*
21. *Bowen* v. *Evans; following Townsend* v. *Warren; the facts stated.*
22. *The heads of the judgment on irregularities in the proceedings.*
23. *And upon the question of fraud.*
24. *And the authorities considered, with the decree: affirmed.*

1. If a decree for sale be fraudulently obtained to the knowledge of a purchaser, or if a fraudulent purchase be made under a decree, the purchaser cannot sustain his pur-

chase. In the case of Gore *v.* Stackpole (*a*), an estate, subject to mortgages, was devised in strict settlement. The mortgagee filed a bill for a foreclosure and sale, (the estate being in Ireland,) to which he made the first tenant for life *in esse*, who was an infant, and the executors of a deceased tenant for life, defendants; but although other remainder men for life were *in esse*, they were not brought before the Court. The usual final decree for payment or a sale was made, and the surplus purchase monies, after payment of the mortgage, were ordered to be paid to the tenant for life. The proceedings were allowed to sleep for many years until the minor came of age, when the estates were sold to a trustee for the tenant for life under a previous arrangement with him, and a surplus of 1,500*l.* was paid to him. The trustee, the purchaser, in order to raise the money, sold a part of the estate to the attorney in the cause for the late minor, and covenanted to make good the sale to him, but no conveyance was executed to him, although he entered into possession; and the trustee sold and conveyed another part of the estate to a third person, who also entered into possession. The tenant for life lived 48 years after this transaction, and upon his death his son, who was tenant in tail, filed a bill for a redemption and reconveyance, or, in other words, to set aside the sales. Lord Clare, C., dismissed the bill without costs, as regarded the purchase by the attorney; with costs, as regarded the purchase by the stranger. Upon a rehearing before Lord Redesdale, C., he declared the proceedings, for want of parties, and with the knowledge of the parties to the cause, to be fraudulent and void against the tenant in tail and other remainder men; but he could not set aside the sales, inasmuch as Lord Clare's decree of dismissal as to them had been enrolled. This led to an appeal to the House of Lords from Lord Clare's decree as to the purchase by the attorney, and

(*a*) 1 Dow, 18; see 1 Scho. & Lef. 234; Blake *v.* Foster, 2 Ball & Beat 687, 565, 574.

his decree was reversed, upon the advice of Lord Redesdale and Lord Eldon, C. Lord Redesdale thought that the cause had been so conducted as to lead the Judges to believe that the tenant for life was the absolute owner, and the interest ought to have been kept down by him, and such would have been the direction of the Court. The purchaser could not avail himself of the decree for sale, as he acted with full notice of the fraud. The decree neither did nor could bind the remainder-man at all, but only the tenant for life. The clearest title could not be used by a person cognizant of any fraud affecting it. Lord Eldon, C., concurred.

When the case of Blake *v.* Foster was before the House of Lords in 1823, the House proposed to issue a judgment explaining why advantage could not be taken of the want of parties in that cause, but the minutes were withdrawn as it appeared that Sir Thomas Blake, of Bourdeaux, whom the House treated as tenant in tail, was but tenant for life. Lord Eldon, C., before the mistake was discovered, observed that in drawing up the judgment of the House in the case of Foster *v.* Blake, he had endeavoured to state very accurately the grounds on which the House proceeded, and it seemed more necessary than usual, because by stating these grounds with so much particularity it would enable those who compared the judgment as entered on the Journals in the case of Gore *v.* Stackpole with the present judgment then proposed, to see that the authority of that case of Gore *v.* Stackpole was entirely untouched by this decision, and that it went entirely upon different principles (*b*).

2. Lord Clare's decree dismissing the bill with costs against the third person, the purchaser was not made a subject of the appeal manifestly because he was no party to the fraud, and bought under the decree, notwithstanding the encouragement given by Lord Redesdale by his declaration in his decree on the rehearing. In the appeal which

(*b*) This is stated in the appellant's case in Blake v. Foster, Printed Cases, D. P. 1823.

we have just noticed, Lord Redesdale observed that Lord Clare's decree not appealed against was, he believed, made on the ground (in addition to the lapse of time) that the purchaser was a purchaser under decree of Court for valuable consideration, without notice of the fraud. He very much doubted however whether this was a protection, as he held it to be clear that a purchaser under such circumstances was bound to see that at least as far as appeared on the face of the proceedings before the Court, there was no fraud in the case. That however had not been brought before the House, and therefore it was unnecessary to say anything further upon it. It is manifest that the opinion of the bar did not go along with that entertained by Lord Redesdale on this point. The fraud, as far as this stranger was concerned, consisted of the remainder-men, who were tenants for life at that time, not having been brought before the Court. But there was nothing to show to the purchaser that the Court was not aware, as it ought to have been, of the fact that the tenant for life in possession only was a defendant as representing the estate; for the pleadings set forth the will with the limitations, and did not misstate the facts, so that the purchaser relying upon the Court might well suppose that the tenants for life in remainder were not necessary parties. It is too much to require a purchaser not connected with the cause to be answerable for such a state of the pleadings when the bar and the bench both treated them as perfect. There is nothing to show that the counsel misstated the case, and although no doubt, as Lord Redesdale observed, the tenant for life ought to have kept down the interest, yet that has not been thought such an objection as would affect a purchaser (*c*), and even in a recent case in the Court of Chancery in Ireland, counsel of eminence persisted for some time against the clear and expressed opinion of the Chancellor in requiring a sale to be made in a like case to cover

(*c*) See 2 Ball & Beat. 573.

the interest which the tenant for life, who was before the Court, ought to have kept down. A court of equity ought not to make a decree for sale without investigation, and then require a purchaser to ascertain that everything is correct. A case of fraud of course stands upon a different ground.

3. In a late case in Ireland, the Chancellor observed that in Gore *v.* Stackpole the sale was deemed fraudulent, and the purchaser had full notice of the fraud. Lord Redesdale's doubts whether even a purchase under a decree without notice of the fraud would be a protection were then referred to, and the Chancellor observed that that went a great way, and he should act upon that opinion with great precaution. If he found a purchaser buying where fraud clearly appeared on the face of the decree, he should hold him to have notice of it, but he should have much hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud which was not discovered by the Court, or the officers of the Court, or the counsel concerned in the cause, whose duty it was not to permit the Court to make a decree not warranted by the facts of the case (*d*).

4. In Colclough *v.* Bolger (*e*), the ground of relief was fraud. An incumbered estate was put into strict settlement on the marriage of Sir Vesey Colclough; he of course being made tenant for life, and he had a power of leasing at rack-rent without fine. Sir Vesey had granted leases under the power at rents below the value for fines—two of them to an agent —and he had granted life annuities. By a decree in a suit by one of the old incumbrancers, the Master was to take an account of the incumbrances, and to report the yearly value of the estates, and the most proper parts to sell. The Master reported only the amount of the debts, and by the final decree a sum composed of principal, and interest which ought to have been kept down by Sir Vesey, was decreed

(*d*) Bowen *v.* Evans, 1 Jo. & Lat. 257.

(*e*) 4 Dow, 54; see Fitzmaurice *v.* Sudlier, 9 Ir. Eq. Rep. 505.

a charge on the estates, and a competent part of the estates was directed to be sold to pay it off. The decree excluded all debts and incumbrances subsequent to the settlement (*f*). In 1780, Henry Houghton purchased parts of the estate at the sale under the decree, including some of which invalid leases had been granted by Sir Vesey. The sales were made subject to the lease and to the annuities (*g*). Sir Vesey died in 1794, when his son (the tenant in tail under the settlement) was a prisoner in France, and the latter filed his bill in 1800, to be relieved from the sale, which he alleged to be fraudulent. The evidence established that Sir Vesey was improvident and embarrassed in his circumstances; that improper leases were made by him; that Kavanagh, his agent, a man of not good character, had great influence over him; that Kavanagh corresponded with Houghton in respect of his purchases, and soon after they were completed obtained from Houghton a valuable lease of part of the property, which interest Kavanagh sold for 1,000 *l.*, and that he also soon after obtained loans from Houghton, which the latter never attempted to recover during Kavanagh's lifetime, and finally, that Sir Vesey was to receive and did receive money for himself for permitting the sales at an under value, and that Sir Vesey was at the time of the sales in a state of particular embarrassment. To rebut this evidence, there was some evidence that the price was a fair one; and it was proved that Houghton was a man of good character, and had opened the biddings on the ground of misrepresentation on the part of Sir Vesey and Kavanagh; but this circumstance was not entitled to much weight, as he undertook to offer as much as before, and again became the purchaser at the same price. Lord Manners, C., dismissed the bill without costs. Upon an appeal to the House of Lords this decree was reversed upon the motion of Lord Eldon, C., and manifestly with the con-

(*f*) See 3 Bligh, 384.

(*g*) See the judgment and the next case, and Printed Cases, D. P. 1816.

currence of Lord Redesdale. Lord Eldon said, that a great deal had been justly said respecting the danger of setting aside purchases made under decrees of courts of equity, and nobody could be more ready than he was to act upon that principle, provided the circumstances were such as would enable them to consider the transactions in question as really and fairly proceeding upon the decree of the Court, and not upon the mere management of the parties themselves. He then relied upon the circumstance that the Master's report did not give the information which the Court required, viz., what was the yearly value of the estates, and what the most proper parts to be sold. But this was not all, for the annuities granted by Sir Vesey, which he had no right to grant (I), would affect the price of the estates sold subject to them; and he gave leases which he had no power to make, and which being made at an under value, must have brought the property to market under such circumstances that it was impossible the infant entitled to the inheritance could have had his fair share of the consideration. But even that was not all, for *he thought it clear from the evidence, that Sir Vesey was paid for his concurrence, that Kavanagh was paid for his management by the benefit which he derived from the transaction, and that Houghton was perfectly cognizant of the leases, annuities, and all the circumstances which affected the sales* (II). He thought that this

(I) This of course means so as to bind the inheritance or the prior incumbrancers.

(II) The sixth reason for the appellant, signed by Romilly, Leach, Peter Burrowes, and Morgan J. O'Dwyer, was, "Because the *single circumstance* of the grant of a most valuable interest out of the purchased lands so near the very day of the conveyance to the purchaser, and made by him to the agent of the tenant for life, who appears to have been a principal actor in managing the sale, and to whom it appears in evidence that a corrupt promise of such or a similar benefit was made prior to the sale by the purchaser, in order to induce an acquiescence in such sale, which was then intended to be opened, is in itself sufficient to avoid such sale, and which, as appellant relies, incontrovertibly proves that the purchase by Houghton, and the beneficial lease to Kavanagh, were concurrent fraudulent transactions neces-

was a case in which he might safely say that as against the appellant, the sales ought not to be held valid, though they had the colour of the protection of a decree of a court of equity: though they might be valid as between Sir Vesey and the other parties, yet they could not be so held as against the infant entitled to the inheritance.

5. It appears that the sales were made subject to the leases and to the annuities. If the leases had been proper ones, to them there could have been no objection; but as to the annuities, it was giving to the tenant for life, at the expense of the remainder-man, the benefit of the sums which he had received for them; still this might have been set right by the Court in account between the parties; but it appears (*h*) that the decree for sale was confined to the incumbrances existing when the estates were put into settlement: the Court, however, thought fit to sell the estate subject to the leases and annuities. As to the omissions in the Master's report, it would seem to be impossible to visit them on the purchaser. The Master, an important judicial officer, thought it proper not to report on two of the three points referred to him, and the Court which directed the inquiry confirmed his report, and acted upon it without difficulty. How then could an obligation be thrown upon an innocent purchaser to object to the judicial authorities having directed more inquiries than they deemed it necessary to prosecute? Lord Eldon qualified his opinion on this point in another branch of this litigation (*i*). But the decision of the Lords may be fully justified upon the circumstances of management and fraud, upon which, in conclusion, Lord Eldon relied. In a later case it was observed that in Colclough *v.* Bolger the estate was sold at an under-value, and the tenant for life and

(*h*) See the next case, and Printed Cases, D. P. 1816.

(*i*) See the next case.

sarily connected with each other, and the result of a previous corrupt agreement between them, and consequently a fraud on the inheritance and on the appellant."

his agent had considerations paid to them for making the sale to the purchaser (*k*).

6. The tenant in tail under the settlement filed a bill in 1805, to impeach a purchase under the decree by another purchaser, which was heard as the case of Colclough *v.* Serum (*l*). It appears (*m*) that *pending the suit* Sir Vesey granted two annuities in 1775, for his life, out of part of the settled estates, to the receiver in the cause, and he granted in 1775 an invalid lease of part of the property to the same person, and in 1779 he granted to the same person another invalid lease of another part of the property. Richards, the purchaser, just before the sale, advanced 50 *l.* to Sir Vesey, upon the joint bond of himself and the receiver, but which the answer stated was afterwards paid off. The property in question was put up, subject to some old leases and to the lease of 1775, but no mention was made of the lease of 1779, and it was insisted that the sale was at a gross under-value. Shortly after the sale Richards, the purchaser, bought of the receiver the two annuities, and the receiver released the annuities and surrendered the lease of 1779, which the respondents alleged Richards was not aware of when he purchased; and at the same time Richards demised to the receiver the lands in the lease of 1775, for an additional life to the three then all in being. The sale was regularly confirmed, and the property duly conveyed to the purchaser. The appellant insisted that all these transactions were in pursuance of a fraudulent agreement before the sale between Sir Vesey, the tenant for life, the receiver, who was also the lessee of the lands and grantee of the annuities, and debtor and tenant to the purchaser, and the purchaser, and that the advance of the 50 *l.* and the grant of the additional life were of themselves sufficient to impeach the sale. Lord Manners, C., dismissed this bill also, but upon an appeal to the House of Lords this decree was reversed, upon the advice

(*k*) See 1 Jo. & Lat. 258. (*l*) 3 Bligh, 181.
(*m*) See Printed Cases, D. P. 1821.

of Lord Redesdale and Lord Eldon, C. Lord Redesdale referred to the terms of the decree, and said that the transaction was impeached on the ground of fraud. The sale subject to the annuities was not warranted by the decree, and the appellant was injured by the sale subject to those annuities during the life of the father, which reduced the value of the estate to that extent, and which induced the party to buy the annuities at a sum greater than was advanced to Sir Vesey. To the extent of those sums, at least, the estate was injured in value. It was argued, he said, that persons purchasing under the authority of a decree ought to be safe; but it was a settled maxim of equity, that persons purchasing under decrees of the Court are bound to see that the sale is made according to the decree. On these principles the appellant had a right to impeach the transaction. The decree protected parties only according to its terms. As the estate was sold subject to the annuities, contrary to the decree, the judgment was erroneous, and the purchase was with notice, because the title was founded on the decree; the purchaser had, moreover, full notice of the settlement, because it was recited in the conveyance. Such a sale, therefore, could not be protected by the decree. Another objection was, that the estate was sold subject to leases, which had been granted under pretence of the power, but were, in fact, contrary to it. It was probable, from circumstances established in evidence, that the leases were fraudulently granted by Sir Vesey; that the purchaser had notice of the under-value there was strong circumstantial proof, sufficient to impeach the transaction on that ground. *It was not however necessary to resort to the ground of fraud*, and without resting his opinion at all on that circumstance, but *confining his view solely to the fact that this sale was made subject to the annuities*, he thought the decree was wrong: *that was a clear ground*, the other might require further investigation. Lord Eldon, C., who appears to have left the case mainly to Lord Redesdale, observed that sales under decrees

were entitled to protection when they were conformable to the decree, but not otherwise. *It might be consonant to moral justice to set a value upon the annuities, and add that value to the purchase-money* (I); but where parties have made a purchase contrary to the authority of the decree, they would not be permitted afterwards to conform for the purpose of taking the benefit of the decree. As to the lease, the main defect was the undervalue. In other respects there were strong grounds for suspicion, but that was not a safe ground for decision. Judicial acts in cases of fraud must rest on clear evidence. By the decree the Master was directed to inquire what parts of the estate were most fit to be sold. No report was made on that point, but whether that defect ought to affect the purchaser might be questionable, since the Court itself ought to have noticed that defect in their proceedings. But the decree, reciting the settlement, directed a sale of the estates, subject to incumbrances of a particular period. The estates were in part sold, subject to after incumbrances, in which the purchaser had an interest (II), and directly contrary to the decree. The loan of money, the purchase of the annuities, the leases at undervalue, and other circumstances appearing on probable evidence, furnished grounds of suspicion. But, at all events, it was clear that a decree not obeyed, but violated, could not be a protection to a purchaser.

7. The purchase was rescinded with very special directions, but notwithstanding the opinions upon which the motion to reverse the decree was made, the order of the House declared "that the sale ought to be deemed fraudulent and void as against the appellant." That, no doubt, was the true ground, and it appears to have been a sufficient one; but the grounds upon which Lord Redesdale and Lord Eldon relied steered clear of fraud, and put the case alto-

(I) See Townsend *v.* Warren, *infra.*

(II) Lord Eldon must have been satisfied that the purchaser had previously agreed to buy the annuities.

gether upon disobedience to the decree. This is a very unsatisfactory ground upon which to rest the decision. The disobedience was by the Court itself: it did not follow the directions of its own plain decree: the Master deliberately sold the estate, subject to the annuities; and this was either thought to be right, or it escaped the notice of the solicitors, of the counsel, and of the Court, and the Court, after a dereliction of its own duty, required the purchaser to employ counsel, and to detect the error, or to lose the benefit of the purchase. But this, which would have been entitled to attention if the purchase had been *bonâ fide*, was, of course, entitled to no weight where the purchase was collusive and fraudulent. Lord Eldon appears to have been struck with the extent to which relief was sought, if the purchaser was bound to be more vigilant than the attornies, barristers, Master, and Chancellor, and he thought that moral equity only required that the value of the annuities should be added to the purchase-money, and we shall presently see that that view has been acted upon by the House in a case of some difficulty.

8. The case of Mullins *v.* Townsend (*n*) was also one in which the sale was set aside for fraud. The estates had been devised by a will, subject to the testator's debts, to the son (in the events which happened), to his wife Lady Ann for life, with remainder to his nephew (his heir at law) for life, remainder to his sons successively in tail male, with remainders over. A creditor's bill was filed by Mullins, and the usual decree was made for the taking of the accounts and the proof of debts. The only defendant having an interest was the nephew. The Master's report of debts included interest which ought to have been paid by Lady Ann, and no receiver was applied for in the cause. By the decree on further directions a competent part of the lands was directed to be sold, and after payment of the debts and interest the residue was directed to be paid to Lady Ann, the tenant for

(*n*) 2 Dow & Cla. 430; 5 Bligh, N. S. 567.

life [but this portion of the decree was not acted upon]. Mullins purchased a part of the estate in the name of a trustee for 5,025 *l.*, and that sale having been opened he again purchased, but in the name of another trustee (Thos. Rice), for 5,050 *l.*, and the estate was conveyed to Rice as if he were the real purchaser. Mullins took a conveyance from Rice a few months afterwards, but did not register it. The sale was alleged and proved to be at an undervalue, and it was insisted that the sale was by the plaintiff Mullins to himself; his attorney, and the clerks of the latter, attending as bidders. After a delay of more than a year and a half, an application was made to the Court to open the biddings [which would now be an irregular motion] upon an offer by a third person to advance 500 *l.* more. Mullins, in an affidavit in answer to the application, avowed that he was the purchaser, but he concealed the fact that the first purchase was also made for him and the payment of the 600 *l.* (I). Whilst this motion stood over, Mullins paid 600 *l.*; 500 *l.*, part of it, to the nephew, the tenant for life, and the remaining 100 *l.* to his attorney; but the tenant for life took half of the 100 *l.* from the attorney for himself. The motion was dismissed. The son of the nephew, who was tenant in tail under the will, filed his bill to be relieved against the sale on the ground of fraud. There were objections to the want of parties to the creditor's suit, and to the want of proper inquiries as to circumstances, but it is unnecessary to refer to them, for the Court of Exchequer in Ireland by its decree declared that inasmuch as it appeared to the Court that the sale was improperly conducted, the completion of that sale, and what, according to the then practice of the Court might be deemed the final confirmation, having been obtained by a dealing with the nephew as tenant for life, to the prejudice of the tenant in tail, then a minor of

(I) The answer said the payment was after the affidavit was filed, but the attorney proved it was paid before. It was urged that the time of payment was not put in issue.

very tender years, and in consequence of a payment of a large sum of money to such tenant for life, in and for his own use, it was ordered that the sale should be set aside as fraudulent and void, as against the tenant in tail, and the conveyance to Rice was, in like manner, declared to be fraudulent and void, and directed to be cancelled. Upon an appeal to the House of Lords, the decree was, upon the motion of Lord Lyndhurst, C., affirmed with costs. Lord Lyndhurst referred to the irregularities, but appears to have intended to rely on the ground of fraud, upon which the case was decided in the court below. This is the true ground to which the decision should be referred, It was a manifest fraud on the part of the purchaser to buy off the opposition of the tenant for life in remainder by a bribe to him and to his attorney. The excuse of the latter was, that he knew the motion could not succeed, and therefore no injury was done to the remainder-man by the acceptance of the money. These payments were proved on the cross-examination of the attorney, who does not seem to have carried the 50 *l.* which he retained to the account of his costs. The tenant for life, who had not previously executed the deed, did execute it as soon as the 600 *l.* was paid.

9. There is still another case in which sales under a decree were set aside for fraud, although it is difficult to collect the real ground of the decision; and the case also establishes a right to damages, which requires our best attention. I allude to the case of Lord Bandon *v.* Becher (*o*). The estates were subject to a mortgage in fee (over part, which was not paid off under the proceedings after mentioned), and to a term of 99 years, to commence from the death of John Becher, to raise 5,000 *l.* for portions, and to a mortgage in fee to Richard Wright, which was regularly created by John Becher (tenant for life), and his son Richard (tenant in tail), and the estates subject to these charges

(*o*) 9 Bligh, N. S. 532; 3 Cla. & Fin. 479.

were, in 1768 (*p*) and 1769, settled on John for life, remainder to Richard for life, remainder (subject to a jointure rent-charge, and a term to raise portions for younger children), to Richard's sons successively in tail male, remainder to John in fee: John the younger was Richard's eldest son. John the grandfather died, and in 1779 a bill was filed in the Court of Exchequer by a person entitled to a part of the portions under the 99 years term, against Richard and his son John, and his brother (both then minors), and against the trustees of the term of 99 years, and of the term under the settlement of 1769, and the trustees of that settlement, for payment or sale of the 99 years term. This suit was called Evans *v.* Becher. After the usual decree and accounts, a sale was, in November 1782, directed of a competent part of the estate comprised in the 99 years term, and the portion due to the plaintiffs was to be paid to them, and the remainder, if any, to Richard, upon his making out a good title to the purchaser. In 1781 another bill was filed in the Exchequer by Wright the mortgagee, which, as amended, was against Richard and his son John, and it prayed a foreclosure and sale. This suit was called Wright *v.* Becher. Ultimately a decree was accordingly made in May 1782, for a sale and payment of the mortgage money, and the residue was to be paid to the defendants, or unto such of them as should appear entitled thereto, upon their making a good title to the purchaser. Other persons who were entitled to other part of the portions under the 99 years term, filed a bill in the Exchequer in 1785, against Richard and his son John, and his brother (both then minors), and against the trustees of the term for payment of what was due to them out of the estates in the 99 years term. This suit was called O'Donovan *v.* Becher, and in that cause a decree was made in January 1787, for sale of the lands in the term, and payment of the money due to the plaintiffs, and the remainder of the produce was to be paid to Richard Becher, or to such

(*p*) The settlement of 1768 contained a power of revocation.

other of the defendants as should appear entitled thereto, on making a title to the purchaser.

10. After a sale (I) in May 1783 of eleven denominations to John Morgan, as a trustee for James Bernard, which was set aside, these eleven denominations and two others were put up in lots. Morgan, as a trustee for James Bernard, bought two lots (containing together five denominations) for 850*l.* and 950*l.*, making together 1,800*l.*, but the biddings for these lots were not closed till the end of November 1783. In the meantime eight other denominations were bought as early as July by Morgan for James Bernard for 7,000*l.* The sales were all had in the mortgagee's cause (Wright *v.* Becher). This 7,000*l.* was thus paid: 3,998*l.* 16*s.* to Wright, which left a small sum due to him, and 3,001*l.* 4*s.* to Evans, the plaintiff in Evans *v.* Becher, by a consent in those two causes. On the 24th July 1783 these eight denominations were regularly conveyed by Richard Becher, Wright, and the Chief Remembrancer to Bernard, and a receipt was indorsed and signed by the Remembrancer for the 7,000*l.*, and the deed was registered. When the biddings were concluded, for the two lots sold for 1,800*l.*, a conveyance was executed, dated in December 1783, of them to Bernard, but although this deed was executed by Richard Becher and by Wright, yet it was not executed by the Chief Remembrancer, who was made a party to it, and no receipt was signed for the purchase-money, although one was indorsed, nor does the money appear to have been paid. This part of the transaction does not seem to have been explained in the course of the litigation. Bernard seems to have obtained possession of these lots upon the execution of this conveyance. In February 1784, Bernard, the purchaser, settled all the estates, upon the marriage of his son Francis,

(I) The statements in the two Reports and in Lord Plunket's judgment, as to the sales, all differ from each other: the facts in the text are collected from the Printed Cases, D. P. 1835. Lord Plunket's summary appears to be accurate.

in strict settlement, with the exception of two denominations, one of which, it was alleged, was omitted by accident, and the other because it was, as it was alleged, a sub-denomination of one of the properties conveyed. This settlement comprised the two lots which had been purchased for 1,800 *l.* (with the exception of the omitted denomination, which was included in one of these lots,) although the money had not been paid. These purchases not being deemed safe, a consent, in Wright *v.* Becher, was signed on behalf of the plaintiffs and defendants, and the purchaser, James Bernard, to set aside the sales and to have the estates resold by the Remembrancer. Two months before this consent the Bill was filed in O'Donovan *v.* Becher, and the intention evidently was to pay the purchase-money for the two lots sold for 1,800 *l.* in discharge of the portion of the 5,000 *l.* claimed by the O'Donovans. The Court of Exchequer made an order for resale in the cause of Wright *v.* Becher, and on the 11th June 1785 four denominations (one of which was comprised in the lot originally sold for 850 *l.*, and the remaining three (1) of which were comprised in the lot originally sold for 7,000 *l.*,) were sold in that cause to Webb, as a trustee for James Bernard, for 4,192 *l.* 18 *s.*, which sale was regularly confirmed, and 194 *l.* 2 *s.* was paid into court, and 3,998 *l.* 16 *s.* was satisfied by the former payment, and the Court, upon the consent of the plaintiff and defendant, ordered a conveyance to be executed on Wright's receipt for 4,108 *l.* 5 *s.* (the sum then due to him for principal, interest, and costs), and on Richard Becher's receipt for 84 *l.* 13 *s.* balance of the purchase-money. This order was obtained by Webb's, that is, James Bernard's attorney. Wright accordingly signed a receipt for the 4,108 *l.* 5 *s.* (which included the 3,998 *l.* 16 *s.* formerly paid), and Richard Becher's attorney obtained the 84 *l.* 13 *s.* out of

(1) A question was raised as to the alleged sub-denomination passing, with which we need not embarrass ourselves.

Court in February 1790. A conveyance of these lands was found engrossed, *but not executed by any party*. At the same time as the last-mentioned sale four other denominations (which were all comprised in the lot formerly sold for 7,000 *l.*) were sold in the cause of Evans *v.* Becher to Barter, as a trustee for James Bernard, for 3,007 *l.* 2 *s.* (this was the sum of 3,001 *l.* 4 *s.* before paid to Evans and 5 *l.* 18 *s.* for post costs). A like order was made in this cause for an assignment, upon a receipt being signed for the money by the Evans', which was accordingly given, and an assignment in July 1785 of the four denominations was executed to James Bernard for the residue of the 99 years term. This deed was executed by Evans, and by Barter the nominal purchaser, and a receipt was indorsed and signed by Evans. It was not executed by the Chief Remembrancer or by Richard Becher. It will be observed that the operation of these resales was to raise nominally 7,200 *l.*, that is, really, 200 *l.* more than had been paid for the eight denominations which, at the preceding sale, had fetched 7,000 *l.* Lastly, in pursuance of a decree in O'Donovan *v.* Becher, in November 1787, three other denominations, or rather four, for two were added together, (and which were all included in the lots sold originally for 1,800 *l.*), were sold to Crofts for James Bernard for 1,600 *l.*, and others were sold to a stranger. An order was made for the execution of an assignment of these lands for the residue of the 99 years term, on a receipt for the 1,600 *l.* being signed by the plaintiffs, which was accordingly done, and in February 1788 an assignment of them to James Bernard was executed by O'Donovan and by the Chief Remembrancer, but not by Richard Becher; and a receipt for the 1,600 *l.* was indorsed and signed by O'Donovan. Now, this 1,600 *l.* added to the 7,200 *l.* made up 8,800 *l.*, the exact sum given for the same property at the previous sales, but of which 1,800 *l.* had not been paid. The dates of the orders and the time of resale of the lots which fetched 7,200 *l.* showed

that there could not well have been any public competition. The result of the resales was, that the same lands (although in different lots and at different prices) were, upon the whole, repurchased by James Bernard for the same sum of 8,800*l.*, and that he then paid the 1,800*l.* which he had not paid on the former sales.

11. John, the son of Richard, who was tenant in tail in remainder, died early in 1820, leaving a son Henry, upon whom the estate tail descended. Richard died early in 1825. In 1828 Henry filed a bill in the Court of Chancery against Lord Bandon, the son of Francis, who was tenant in tail under the settlement of 1784, to set aside the sales under the decrees of the Court of Exchequer as fraudulent, and for compensation out of the assets of Bernard, the purchaser, if all the lands could not be delivered up to him. Lord Plunket, C., by his decree declared that the sales to James Bernard in 1783, 1785, and 1787 could not be maintained, the sales of 1783 having been set aside with his consent, and the sales of 1785 and 1787 having been effected by private arrangement under colour of the decrees of the Court of Exchequer, and after the execution of the settlement of February 1784, which disabled the parties to the said sales from making title to a purchaser. The cause was reheard, but the decree was affirmed. Lord Plunket, in delivering judgment (*q*), after referring to the purchases, observed that there was no question whether the Court of Chancery had a right or not to interfere. He did not interfere with any decree of the Exchequer; the proceedings here [there] were abandoned, and they got up a new proceeding to have it believed to be the fair proceeding of this [that] court. But it was quite a mockery. It was said no advantage had been taken, that there had been no undervalue (I). He did not proceed

(*q*) Reported in 9 Bligh, N. S. 552.

(I) In the appellant's case it was stated that at the hearing below it was admitted that the money was paid to Evans & Wright; that it was the full value in 1783, and that there was no moral fraud.

upon that ground, but he said the person who had a right to the protection of the Court, the minor, had not received it: he could only get that protection under sales conducted openly, and on fair competition, but he had as convincing evidence *as could at that distance of time be produced* that the sales were not had in that way in which the highest value could be got for the lands. He said that the objections were more than formal, for it appeared, first, that the fee simple of an estate was sold in payment of a sum charged only on a term; that was not merely an error, *it was a gross fraud.* It was said that this was an advantage to the inheritance; it might be so in a case of fair competition in the sale. He found further an arrear of interest in this transaction. He did not say that that was an error which could affect the purchaser, but he alluded to it to show the unjust way in which the estates were sold by the party who should have protected them. Again, part of the purchase-money (a small part, he admitted) was paid to the tenant for life, who had no kind of right to any part of it. Again, when one sale would have been sufficient, the estate was put to the expense of three. And again in 1783, when five denominations were sold for 1,800 *l.*, that sum was not paid, but James Bernard entered into possession of these five denominations, although he had paid nothing for them; and further, when the proceedings were set aside in 1785 they were set aside without costs given to the minor, though it was admitted they were quite erroneous as to him. No costs were given to him, but the costs were charged against him. And further, there was a repetition in 1785 of the former sales, when they knew there was a deed, under which they could not make title. These transactions (without making any imputations on the moral character of the persons engaged in them) appeared to have been in the view of a court of equity completely fraudulent, and could not be sustained. He said that he was not meddling with the sales of the Court of Exchequer; he considered that James

Bernard entered into these lands by the only good title he had, viz. an assignment of these charges, and he held that there was still a power to redeem them. The Lord Chancellor further observed that no day was given to the minor to show cause, but he was not called upon to decide that point. Here a party enters into possession under a mortgage title, and taking advantage of the embarrassments of the tenant for life, that was the point on which he founded his decree. Upon an appeal to the House of Lords this decree was, upon the motion of Lord Brougham, with some hesitation affirmed. He observed that it was not an irregularity, it was not an error in substance, which was complained of. It was because the whole proceeding was collusive, and mixed up with fraud from the beginning to the end; it could not be taken to be a proceeding leading to a judgment, consequently all that was done in the Exchequer must be passed by as nothing.

12. The grounds upon which Lord Plunket relied more or less were 10; viz. 1, want of protection of the minor; 2, sale of the fee instead of the term; 3, an arrear of interest provided for; 4, payment of a small balance of the purchase-money; 5, three sales instead of one; 6, £.1,800. not paid in 1783, although the purchaser took possession of the five denominations; 7, costs not given to the minor on the resales, but charged against him; 8, the resales in 1785, after the settlement of 1784; 9, no day to the minor to show cause; 10, entry by mortgagee taking advantage of the embarrassments of the tenant for life. It is hardly necessary to dwell upon the third, fourth, fifth, sixth, and ninth objections, as they could not seriously be made the foundation for impeaching the sales; they were irregularities for which the Court and its officers were responsible, and which could not be visited on the purchaser. Upon the tenth objection it may be observed that James Bernard clearly entered as purchaser; he never was mortgagee, nor did he intend to fill that character—whether the nature of the transactions authorized the

Court to treat him as mortgagee was the question. There is no proof that he took advantage of the embarrassments of the tenant for life. Many charges of fraud were made against him in the bill, *e. g.*, that a considerable sum was paid by him to Richard Becher as a premium or reward for consenting to the sales, but they were all denied by the answer. James Bernard was proved to be a person of integrity, and none of the charges of fraud was sustained by evidence. Lord Plunket, in the commencement of his judgment, stated that he did not proceed on advantage taken or of under-value. The second ground, viz., the sale of the fee instead of the term, was a weak one, for the same price was given as for the fee of the other lands, and under-value was not proved. The purchaser, under all the transactions, was only entitled to the 99 years' term, and might have been confined to that interest, which would not have expired before 1877, as John Becher, the tenant for life, did not die until 1778. The first and the eighth were the real objections, and the former depended upon the latter. The true ground is stated on the face of the decree itself. It seems clear that there was no fraud in the case, and that the estate fetched its full value, but the first sales were manifestly made in order to pay off the O'Donovans, as well as the Evans's and Wright, but it was discovered that Evans had been irregularly paid out of the money produced by the sale of the fee in the mortgage cause, and that O'Donovan could not be paid off under the decrees already obtained. All this might have been rectified with the approbation of the Court, so as to vest a perfect title in the purchaser; but the resales were mismanaged. The 1,800 *l.* due on the first sale had not been paid, and the payment of that sum was effected by the sales in O'Donovan's cause. The first sale of the eight denominations could not have been impeached, nor could the sale in O'Donovan's cause if it had stood by itself. But the parties took such an indirect course to execute a legal purpose, that I am not surprised at the sales having been set

aside; and there certainly was a difficulty arising from the first sale for 1,800 *l.*, as a portion of the property included in that sale was resold in Wright *v.* Becher, but still the same property in the result fetched the same price, viz. 1,800 *l.*, for 200 *l.* was evidently the price put on the part resold in Wright *v.* Becher, and the rest fetched 1,600 *l.* in O'Donovan's cause. The resales could not be considered as intended to be open to public competition, whilst the settlement of 1784 remained undisturbed and was not brought to the attention of the Court; but there appears to be no reason to doubt that the sale for 1,600 *l.* in O'Donovan's cause was open to competition, because other property to nearly the same amount was sold shortly afterwards under the same decree to a third person, and both sales were completed by order of Court at the same time. But as the full value had been given by James Bernard, it was not likely that any further bidding would be obtained. The object of the parties was to so arrange the sales as to satisfy every claimant by a sale in his own cause: there was a good deal of bungling but no fraud, the estates were not sold at an undervalue, and all the purchase money was *bonâ fide* paid. The more I consider the case, the more I am inclined to think that the sales might have been supported without breaking in upon any rule of equity. The nonexecution of proper conveyances on the resales was properly relied upon as evidence of irregularity, but where the proceedings are *bonâ fide*, the order made for a conveyance and the money paid to the proper hand, the want of a conveyance may be a serious inconvenience to an improvident purchaser, but it cannot authorize the Court to set aside the sale. I have thought it of importance to sift this case carefully, in order to prevent conclusions being drawn from it which it does not warrant. In Bowen *v.* Evans (*r*), in Ireland, the Chancellor observed that he had read the case of Lord Bandon *v.* Becher with a great deal of attention, but he was not sure that he under-

(*r*) 1 Jo. & Lat. 178.

stood the grounds upon which it was decided. The sales, however, were treated as sham sales, and it must he supposed have been upon that ground that they were set aside: it was treated as a case of fraud.

13. The specific relief in the above case was confined to the small portion of the property not comprised in the settlement of 1784, for Lord Bandon insisted upon 40 years' possession as a purchaser under that settlement, and that defence was allowed. The bill prayed in the alternative for compensation. Lord Plunket, in giving judgment, said that but for the settlement of 1784 all would be perfectly clear. He thought it was conceded by the plaintiff that the present defendant (I) to protect himself (as the plaintiff had no remedy against the lands) must look to the assets of James Bernard, which it was admitted were abundantly sufficient, and the plaintiff was satisfied to resort to the assets instead of the real estates. The decree declared, that inasmuch as Lord Bandon, the personal representative of James Bernard, relied on his title as a purchaser, the plaintiff was entitled to the full value of such of the lands as were bound by the settlement of 1784 to be paid out of the assets of James Bernard, after deducting thereout the balance which should appear due on taking the accounts. The question of the value of the plaintiff's estates in the land was sent to a jury. In the House of Lords, Lord Brougham considered it to be necessary for him to take time for further consideration upon the questions:—First, in what manner the compensation alleged to be due ought to be awarded; and, secondly, what was the importance of the length of time which had been suffered to elapse: he could not, he said, discover the reasons (II) upon which the noble Judge in the court below proceeded; he came to these points suddenly at the conclusion of his judgment; he did not explain or argue the points.

(I) There seems to be some inaccuracy in this passage.

(II) The reasons for deciding the questions of time were fully given in Ireland.

On a later day Lord Brougham stated that he had considered the question, and he had some communication with Lord Plunket. He (Lord B.) formed a conjecture what his reason was, and on conversing with him he found that to be the reason operating on his mind. He (Lord P.) had a distinct recollection of the case; it was a case on which he had taken very great pains; and he found, on consulting him, that he had proceeded on the same grounds which had occurred to him, not knowing his (Lord Brougham's) view of it. Lord Plunket had taken the same view which he had taken. He (Lord Brougham) did not mean to say that the case was without difficulty in any view he could take of that branch of the case on which the reason was not expressed. At the same time he had not so clear and strong an opinion as would justify him in recommending the House to reverse. The decree was upon Lord Brougham's motion affirmed, but without costs, as it was a case not entirely free from doubt.

14. It is much to be regretted, that neither in the Court of Chancery nor in the House of Lords was any mention made of the ground upon which the difficult question of compensation was decided. There never was a point upon which information was more to be desired: 1. As to the jurisdiction generally, particularly after such a lapse of time. 2. What was the true measure of damage, whether what the estate was really worth when purchased, or its present value. As the estate fetched its full value at the time, could damages be given by equity because the estate had in 40 years become more valuable. Suppose James Bernard had, in 1784, sold the estates instead of settling them, would he have been responsible for more than the price obtained? was there any reason to suppose that they would then have fetched more than he gave for them? 3. To whom the damages belonged, for John (the son of Richard), the tenant in tail, lived until 1820, although he did not survive his father, and the plaintiff in the suit took from him by descent. These several points will require to be fully consi-

dered before the question now under consideration can be considered as satisfactorily settled. The case which we are next to consider was not quoted in Lord Bandon *v.* Becher, and yet it was a recent decision by the House, establishing an important principle, but little calculated to support the decision in the later case. It escaped attention, no doubt, because it was not reported.

15. The case to which I allude is Townsend *v.* Warren (*s*), the facts of which, as far as they are important, appear to be these. An estate had been put into strict settlement, and was vested in Cornelius Townsend in tail male, subject to a charge of 600*l.* for his sisters. This was called the settled estate, and was not the estate which was the subject of the litigation. The "Bridgemount estate" had been mortgaged in fee by Horatio, the father of Cornelius, (together with his life estate under the settlement,) and then devised (subject to the mortgage and to legacies to his daughters, the sisters of Cornelius,) to Cornelius for life, remainder in tail male, (which limitation failed for want of issue,) remainder to the sons of the daughters successively in tail male, under which, in the events which happened, Richard Orpen Townsend, the appellant, took an estate in tail male in remainder, expectant upon the death of Cornelius and the failure of his issue male. This was the estate in question. Under the will of an uncle, Cornelius was seised in fee of "the Cashill estate," subject also to legacies to his sisters. Some of the sisters filed a bill against Cornelius and the parents of Richard, and against Richard, who was then a minor, and the representatives of the mortgagee, in order to have all their charges raised out of such funds as the Court should think fit. On the 21st May 1778, the usual decree was made for an account. On the 28th December 1778, before the Master had made his report, an agreement (I)

(*s*) 1 Jo. & Lat. 221, n.; 6 Ir. Eq. Rep. 620; Printed Cases, D. P. 1823.

(I) The terms of this agreement, which was proved in the cause, are stated in 1 Jo. & Lat. 229, n; they are not set out at large in the Printed Cases,

was executed between Cornelius and Sir Robert Warren, which, after stating that the bill of foreclosure had lately been filed in the Court of Chancery or Exchequer, *and that a final decree had been lately had* for the sale of the lands, or a sufficient part of them, to pay off the incumbrances, and that Cornelius had proposed that five denominations of the Bridgemount estate therein described should be first set up and sold by the proper officer, and the money arising on such sale, or as much as necessary, should be applied in discharge of the debts and incumbrances affecting the lands so proposed to be sold, and that Cornelius had valued the said lands at 7,817 *l.*, and that Sir Robert had agreed to become the purchaser of them under the decree, provided a good title could be made within six months. Then, in consideration of 500 *l.* to Cornelius paid by Sir Robert, and of 7,317 *l.*, to be paid as soon as a sale should be had under the decree and a good title made out, Cornelius covenanted to convey to Sir Robert the five denominations in fee, and that the decree should be carried into execution, and a sale had to Sir Robert within six months, and that Cornelius would pay the expenses of the sale, the deeds of conveyance and making out the title, as Sir Robert was not to be at any expense. The agreement then recited that Cornelius had that day passed his bond with warrant of attorney to Sir Robert for 500 *l.*, payable on the 28th June next, and it was declared that if Cornelius should not fulfil his agreement, and that Sir Robert should not be declared the purchaser under the decree, and a clear title made out, and deeds executed within the time aforesaid, it should be lawful for Sir Robert to sue for the contents of the bond. Sir Robert covenanted to pay the 7,317 *l.* on a clear title and deeds executed as thereinbefore mentioned. Sir Robert paid the 500 *l.* to Cornelius, and the bond was executed as stated in the agreement. In February 1780 the Master

neither is there any copy of or extract from it in the appendix. None of the usual documents is set forth in the appendix.

reported the sums due on the mortgage, and separately for the portions and legacies on the several estates. By the final decree in June 1780, the usual sales were directed of the several estates to discharge their several liabilities. The direction to sell the Bridgemount estate or a competent part thereof, directed a sum of 556*l.* 15*s.* 3*d.* (being a part of the legacy due to one of the daughters, which was settled) to be paid to Daniel Crump, one of the trustees of it, the other trustee being Cornelius himself. The remainder of the purchase-money, if any, after payment of all the charges, was to be paid to such person or persons as should be entitled thereto. The sums found due by the Master included interest, which Cornelius ought to have kept down, and there was no direction that he should repay it, and no day was given to the minor to show cause against the decree. The Master in July 1780 advertised sales in November of the three estates, or so much thereof respectively as should be sufficient to pay the parties in the cause the sums decreed to them with interest and costs. Shortly before the sale a verbal agreement was entered into between Cornelius and Sir Robert that eight denominations of the Bridgemount estate (instead of five) should be sold, and that Sir Robert should bid 10,600*l.* for them. On the 16th November 1780 the sale took place, and John Hewson bought the eight denominations for Sir Robert at the sum agreed upon, 10,600*l.*, and after the sale was duly confirmed the lot was duly conveyed in January 1781 to Hewson in fee by Cornelius and Richard the minor, tenant in tail in remainder, with the consent of the Master, in consideration of the 10,600*l.* paid to the Master by Hewson for the uses in the decree mentioned, and Hewson declared that the money was Sir Robert's, and in February following he conveyed the estate to Sir Robert in fee. The 10,600*l.* was not sufficient to pay the incumbrances on the Bridgemount estate, and on the 15th February 1781 the remaining denomination of that estate, on which the family residence was

situated, was sold before the Master to Philip Splane as a trustee for Sir Robert for 2,600 *l.*, and after the sale was duly confirmed the lot was, in July 1781, duly conveyed to Splane in fee by Cornelius, with the consent of the Master, in consideration of the 2,600 *l.* paid to him for the uses in the decree mentioned. The minor did not execute, although he was made a party to the deed. Splane declared that he was a trustee for Sir Robert, and a few days later he conveyed the lot to Sir Robert in fee. The settled estate was sold in May 1781 to a third person, and Cornelius paid the debt due on the Cashill estate, and that estate was not sold. There was no proof as to any concert in regard to this sale, and there was evidence that other persons of property besides Sir Robert had viewed the lands "with the idea of bidding at the sale."

16. From these statements it appears that Cornelius, the tenant for life, obtained 500 *l.* from Sir Robert, which, according to the agreement, was to go in part of the purchase money, but from the receipts in the conveyances it appears that the whole of the purchase money was paid by Sir Robert to the Master. It is clear that the purchase for 10,600 *l.* was a substitution for the purchase originally agreed upon, and that the sale was effected by the tenant for life with the aid of the decree. Sir Robert attempted to explain away the advance of the 500 *l.*, and in his case it was stated that it was accounted for by Cornelius as part of the 557 *l.* odd, of which he was a trustee, but there was no evidence of this, and that sum was reported due to Daniel Crump, his co-trustee. The reasons for Sir Robert, the respondent, stated that the agreement to allow out of the purchase money the 500 *l.* advanced to the tenant for life, was no more than he was fully competent to make, a sum beyond that amount *being reported due to him as a trustee*, and since no complaint to the contrary had been made, *it must then be taken that the sum so advanced was applied by him to the purposes of the trust.* This statement seems to

afford a fair inference that the 500 *l.* was retained by Cornelius for his own use.

17. After the purchase Sir Robert made three leases upon which much stress was laid. By the first, in 1781, he leased four denominations, one of them having been comprised in the agreement of 1778, and another, being the lot lastly purchased, on which the house stood, to Cornelius, for a long term of years, at 408 *l.* per annum, which lease was afterwards evicted for nonpayment of rent, and Sir Robert let the lands in lots, at a small advance of rent. By the second of the leases, in May 1781, he demised one of the other denominations to Harding for 999 years, at the rent of 110 *l.* per annum, and in June 1781, by a third lease, he demised another of the denominations to Harding for 999 years, at the rent of 100 *l.* This last denomination Sir Robert had previously agreed to let to Cornelius, and it was at his request that the lease of it was granted to Harding. It was alleged by Richard that these leases were agreed to be granted by Sir Robert as a consideration to Cornelius, beyond the 500 *l.*, for allowing him to become the purchaser, and that Harding paid a sum of money to Cornelius in consideration of the last-mentioned lease. Thus the facts appear to have stood when Richard, shortly after coming of age, in the lifetime of Cornelius, filed a bill against Sir Robert and others, to which Cornelius was afterwards made a party, to set aside the purchases by Sir Robert as fraudulent and void, and that the leases might be set aside. Sir Robert by his answer denied all fraud, and denied that the leases were made in pursuance of the alleged agreement, or at the instance of Cornelius. Harding, by his answer, admitted that having heard that Cornelius had an agreement for a lease of the denomination in the third lease, he paid Cornelius 250 *l.* for relinquishing the agreement in his favour. Cornelius, by his answer, admitted that Sir Robert had agreed to execute the leases to him subsequent to the article of 1778, but previous to the pur-

chase of the estate by Warren, and that he afterwards recommended Harding as tenant to the denomination in the third lease, in consideration of 80 *l.* or thereabouts paid to him by Harding. The evidence of value was, as usual, conflicting. There was no direct evidence of the previous agreement to grant the leases beyond the admissions in the answers of Cornelius and Harding. The purchase-money was applied in payment of the mortgage and incumbrances, and Sir Robert admitted that he had obtained a transfer of the mortgage. Lord Manners, C., was of opinion that the sale for payment of the incumbrances was right. He thought the plaintiff [as tenant in tail in remainder] was entitled to file the bill, but as to the sale being for interest due, he thought that the tenant for life might be responsible, but not a purchaser under the decree. He said that one of the parties to the leases [Cornelius] admitted that they were made in consequence of an agreement entered into prior to the sale. This he thought required an inquiry. Sir Robert must have had full notice of Cornelius's title. The tenant for life was to get 500 *l.*, and engaged that Sir Robert should be the purchaser, and there was a further agreement that the tenant for life was to get beneficial leases. Nothing can be more fair than that a tenant for life should endeavour to obtain the highest value (1), but he was not to retain any benefit for himself. He thought *all he could do for the plaintiff* would be to refer it to the Master to inquire whether the sales of November 1781 to Sir Robert were fairly and properly had, and for full value, and whether the same were affected by the agreement between Sir Robert and Cornelius. The articles spoke for themselves. Cornelius obtained a benefit for himself, and this was to be coupled with the previous agreement. But if the estates had been sold for the full value it would be idle to think to

(1) It was insisted by the answers that this was the object of the agreement of 1778, and that the usual course was, if possible, to secure a purchaser before the sale.

set aside the sale. If it appeared that the full value was not given, Sir Robert must make up the difference, *but he would not set aside the sale.* As to Cornelius, he thought he ought to direct an inquiry whether he received any consideration for the sale, and any consideration by reason of the leases made to Harding, and whether he kept down the interest on the incumbrances. As he had said, he *never intended to disturb the sale,* although if Sir Robert did not pay the full value he must make up the deficiency. In 1778 the estate must have been sold, and therefore the plaintiff would not be entitled to it. *Those cases where estates sold had been brought back were where the estate ought not to have been sold*; but the sale was necessary here, and the only question could be, was the full value given? All that the plaintiff could have was that the sale might be rectified, that is, by ascertaining the value in 1781, and whether the purchase-money amounted fully to that. *He could not set aside the sale.* It was irregular, but not a distinct fraud. Sir Robert gained no advantage by it, although Cornelius did. He *was not called upon to give more than the plaintiff would have been entitled to.* The gravamen was that the full price was not given, and the sale might have been affected by the contract with Cornelius. He added that Cornelius should not retain a single shilling of any advantage gained by him in the transaction. The decree accordingly was for an inquiry whether the sales to Sir Robert were to the full value, or whether they were influenced or prejudiced by the agreement of 1778, or by any agreement for subsequent leases, to be executed by Cornelius, or by reason of any other cause. And if the sales were so influenced, or had at an under value, then the Master was to inquire what was, *at the time of such sale,* the fair value, and the 13,200 *l.* was to be deducted from the fair value, and the difference, if any, should be brought into court by Sir Robert. There were then directions to inquire as to premiums and benefits received by Cornelius, and as to pay-

ment of interest out of the purchase-money, which he ought to have paid, and an order that he should pay the amount thereof into Court.

18. This decree, with the grounds upon which it was made, is now distinctly before us. Although the sale was, in effect, made through the tenant for life previously to the sale before the Master, and although the tenant for life received 500 *l.* without any authority from the Court, and stipulated for leases to himself, which he obtained, yet Lord Manners confined the relief to the giving to the person entitled under the will, the full and fair value of the property at the time of the sale. This in the absence of fraud, which he thought was not made out, although there was irregularity, was all that a due administration of equity required; but although, as we have seen, Lord Eldon had hinted at such relief in a previous case (*t*), yet it was a new modification of the rule usually applied to such cases. It is material to keep in view the state of the case when the decree was made.

19. From this decree there was an appeal to the House of Lords, and the reasons signed by Messrs. Burton and Parsons insisted upon the irregularity of the original decree, and proceedings in the legatees' suit, and upon the private bargain between Sir Robert and Cornelius, and that it was impracticable to ascertain what the estate would have produced in 1781 if fairly sold by auction, and that the inquiries would tend to involve the plaintiff in difficulties which ought not to be imposed upon him by or in consequence of the irregular and fraudulent conduct of Sir Robert and Cornelius, and finally, because it was conceived to be the invariable rule and practice of a court of equity, where a fraudulent sale has been made under a decree, to set the same aside, and not to establish such sale upon the terms of making compensation to the party aggrieved by such

(*t*) *Supra*, p. 689.

fraudulent sale. The decree was simply affirmed with 100 *l.* costs (1).

20. In a later case in Ireland, before Sir E. Sugden, C. (*u*), he observed that Townsend *v.* Warren was indeed a peculiar case, and was an authority upon which—finding no case authorizing him to set aside the sale in the case before him—he should rest his decree. The sale was made pursuant to an arrangement entered into previous to the decree, and the decree was made use of for the purpose of giving effect to that prearranged sale. The tenant for life assumed a power to sell the estate, he received part of the purchase-money for his own use (*x*), and he stipulated for certain benefits to be given to him out of the estate, and in pursuance of that very stipulation leases were granted to third persons, who paid the value of them to the tenant for life (*y*). The tenant for life therefore committed a gross fraud; he sold the estate and received part of the purchase-money himself, and he stipulated for and obtained a lease of part of the property for his own benefit, and the sale was for interest which ought to have been paid by the tenant for life. Lord Manners confined the relief to value, and he did not come to the conclusion that the estate had fetched the full value, for he referred it to the Master to inquire

(*u*) Bowen *v.* Evans, 1 Jo. & Lat. 178.

(*x*) Vide *supra* as to the 500 *l.*

(*y*) Vide *supra*, 80 *l.* by Harding.

(1) The conclusion of the cause, which cannot affect the decision as affirmed by the Lords, was, that there was a decree against Cornelius's representative for the repayment of the interest improperly paid out of the produce of the sales, and as to the other defendants the bill was dismissed without costs. It was established by the Master's report that the sales were for the full value, and were not prejudiced by the agreement of 1778, nor by any agreement for subsequent leases, but the Master charged Cornelius with the 80 *l.* which he admitted he had received from Harding; it does not appear that any report was made as to the 500 *l.*; see 1 Jo. & Lat. 236, n. In the absence of such a report it might have been supposed that the estate was at least worth the additional 500 *l.* paid to Cornelius, and the 80 *l.* also paid to him.

whether the premises were sold at their full value. That decree was affirmed by the House of Lords, and he should follow it as he was bound to do. If he were asked whether he agreed in the decision of that case, he should say he did not, for there was clearly a fraud practised on the inheritance (*z*), and the purchaser was in his opinion a party to it. That decision however established this principle—to which extent he fully concurred in it—that if in such a case as that before him, he could do justice to the persons claiming under the settlement, and at the same time support the sale, that was the measure of equity which he ought to decree.

21. In the case of Bowen *v.* Evans (*a*), above referred to, the estate was subject to a mortgage debt over part, and to judgments and simple contract debts and legacies to a large amount, and stood limited under a will to Henry Cole Bowen for life, remainder to his sons successively in tail male, remainder to Robert Cole Bowen for life, with like remainder to his sons, with like remainder to other sons of the testator and their sons, with remainders to the testator's daughters as tenants in common in tail, with remainder to the testator's right heirs. Portions were charged by the will for younger children, and the trustees (who declined to act) were empowered to raise the portions as they should become due by sale or mortgage, and to raise by like means a sum sufficient to discharge the just debts. Henry, wishing to sell a portion of the estates under the power, advertised them fully in June 1788, stating that such of the lands as were let on determinable leases would rise very considerably, with references to himself, and to an agent, and to an attorney. In pursuance of these advertisements, the lands of Kilbolane were, before February 1789, agreed to be sold (but no written agreement was entered into) to

(*z*) See the final decree, *supra*, p. 712, n. which was not then produced.

(*a*) 1 Jo. & Lat. 178; 6 Ir. Eq. Rep. 569. See Magawley *v.* Brady, 9 Ir. Eq. Rep. 59.

Mr. Bruce for 19,025*l.* (being 21¼ years' rental and 100*l.* over). Several other parts of the estate were in like manner agreed to be sold to other persons. Bruce advanced part of the purchase-money in paying off judgment creditors, taking assignments of the judgments to himself or a trustee. Bowen and his agents and Bruce arranged that a bill should be filed to carry the sales into execution, and accordingly a bill was filed in the Exchequer in Ireland in August 1789 by Mrs. Grove, who was a judgment creditor, and a purchaser of one of the lots, and a sister of the testator's widow, against Henry, the tenant for life, the widow, who was the executrix of the testator, the younger children of the testator, and other persons, for a general administration of the estate and for a sale, and that the old trustees might be removed, and new ones appointed. At this time the first estate tail was vested in the testator's daughters. Robert Cole Bowen was in India, and remained there till 1793, but his absence was not stated in the bill. Amongst the answers put in was one in which Robert Cole Bowen was made to join with several of the adult defendants; it was put in without oath by consent, signed by Richard Martin as attorney for the plaintiff; but he subsequently did acts amounting to a recognition of the proceedings: none of the signatures were in the handwriting of the parties. Other answers were signed by Charles Martin, an attorney, who acted for Richard Martin, who appears to have been engaged on all sides. In February 1793 a decree was made for carrying the trusts of the will into execution, and for an account of the real and personal estate, debts, and legacies, and to report whether any of the debts and legacies had been paid off, and by whom, and out of what funds. Bruce continued to pay off judgments. In 1790 Bowen agreed to secure interest to Bruce on interest due to him, if not paid. Bruce's object was to secure himself, but to accommodate Bowen. Bowen's object appears to have been to throw as large a charge as he could, in exoneration of himself, on the

estate. Bowen making default, Bruce threatened legal proceedings if he had not his interest in money or bonds, but Bowen did make payments for interest, and Bruce urged the execution of the decree; the interest of the other charges on the estate was regularly paid. The Remembrancer made his report, naming new trustees, and he found that *Henry C. Bowen, on the testator's death, entered into the receipt of the rents and converted them to his own use*, but did not state the amount. There was personal estate, but the report did not include some considerable arrears of rent due at the testator's death. He found the sums due to Bruce and to his trustees, which included a large amount of interest, and he reported 1,500*l.* due upon one of the securities, although 300*l.* had been paid off by the testator in his lifetime, and the assignment of the security recited the fact of the payment, and ultimately 1,200*l.* only was claimed in amount. By the final decree in 1794, the new trustees were appointed, and the Master was to compute interest to the date of the report, and by consent the order for payment was made to be within three months, in default there was the usual decree for a foreclosure of the part mortgaged, and a sale of the mortgaged and other real estates, or a competent part. The estates were conveyed to King and Galway, the new trustees in fee. King died, and Galway acted; he was the agent of Henry C. Bowen, and had also acted for Bruce, although the latter had his own solicitor. The estates were advertised for sale, and the sale took place in December 1794, and Richard Martin (after biddings by two other persons, the nature of whose biddings was disputed,) was declared the purchaser of Kilbolane, at 19,025*l.*, the price originally agreed upon. Martin bid for Bruce by his direction. A conveyance of this property to Bruce in fee, dated in December 1797, was executed by the trustees, King and Galway, Henry Cole Bowen, the tenant for life, and Margaret Bowen, the widow and executrix, but it was not executed by

the Remembrancer, nor was the money paid, as therein expressed, into the Bank. Bruce continued to pay off some of the charges, but he could not obtain a title, as there were prior incumbrances, and there was not sufficient money to pay them off. Bruce, in 1802, agreed with the two trustees and the tenant for life for the purchase of another part of the estate called Bowensford, for 6,200 *l.*, to be paid in discharge of the incumbrances, and having amongst others paid off the sum due to the executor of the plaintiff Catherine Grove, the debt and the benefit of the decrce were assigned by him to a trustee for Bruce. By a consent in 1809, in the cause, three of the creditors agreed to rest upon the security of the unsold estates, and released the others. The cause was not revived. An order was made for the payment of the mortgagee out of the money in Court, and the Remembrancer reported the amounts of the purchase-monies for parts of the estates sold to other persons, and the sums due to creditors, which included sums vested in Bruce and his trustees, and thereupon in 1810 an order was made that the officer should execute a conveyance to Bruce of the estate sold for 19,025 *l.*, upon Bruce and his trustees (by name), signing receipts for several sums vested in them; amounting altogether to 19,025 *l.*; it appearing that the purchase-money in Court of another purchaser would pay the first creditor (and who was accordingly paid therewith), and that the other two prior creditors, and a subsequent creditor, by a consent had released those lands. The receipts were accordingly signed, and in June 1810 a conveyance was executed to Bruce in fee of Kilbolane, by the Chief Remembrancer, Galway, the surviving trustee, and Henry C. Bowen, the tenant for life, and by Martin and Bowen. Upon the two purchases Bruce claimed a large balance to be due to him. Henry C. Bowen died in January 1837 without issue. Robert Cole Bowen, the second tenant for life, died in 1806, having first married a daughter of Galway's, and left issue Henry Cole Bowen,

who died in 1841, and left issue a son, who in 1843 filed a bill against the representatives and others claiming under Bruce, who died in 1837, to set aside the purchases made by the latter as fraudulent and void. It has not been attempted to explain the grounds upon which the question of *bona fides* turned, irrespective of the documents and acts in court, for that depended upon a long correspondence, and upon the acts of the parties during several years.

22. Sir E. Sugden, C., observed that nearly half a century had elapsed since the purchase, and all the parties to the original transaction were dead. There were the following objections raised, which he held could not affect the purchaser: 1. The decree gave the legatees six per cent. interest after their majority; he believed that was according to the course of the court at that time, but he was clear that there was nothing fraudulent in that part of the transaction, and it was therefore unnecessary to consider that objection further. 2. To the objection that the signatures to the answers were forgeries, he observed, that in the proper sense of that expression they were not, but that they were not signed by the parties whose answers they purported to be, was clear: however, they never professed to be so; the signatures were all in the same handwriting, by the same person; and there being an order for liberty to file them without oath, they were most irregularly, he agreed, but not fraudulently, put in with signatures professing to be the signatures of the parties to them. 3. As to the question as to Robert C. Bowen, he came to England shortly after the sale; he received many years afterwards his portion out of the estate, without complaint as to the mode in which his answer was put in, and he must have known what had taken place in his absence. He did not think that this objection raised by persons who sought to make use of Robert's name for their own purpose was entitled to much consideration. 4. As to the objection upon the assignment in 1802 of the benefit of the decree to a trustee for Bruce, there was no proof that any fraudulent

use was made of that assignment. The mere circumstance that Bruce paid off the plaintiff's debt did not show that he exercised any influence he possessed to commit a fraud: he was in the habit of purchasing up the incumbrances under the arrangement between him and Bowen. 5 & 6. Upon the objections that the suit abated by the death of the plaintiff, and also that certain tenants in tail in remainder, who came *in esse* pending the suit, and who were entitled to estates prior to that of the ultimate remainder-man then before the Court, were not made parties to the suit, he said that the latter objection could not prevail against a *bonâ fide* purchaser; and as to the abatement—where a purchase had been made under a decree, and everything arranged except the execution of the conveyance, which was delayed by accident or negligence until the abatement; when the Court acting in the abated cause with the parties before it really interested authorizes the deed to be executed and the purchase to be completed—he should be sorry to hold that the abatement was to operate to impeach the title of the purchaser. The Court itself ought in some measure to be responsible in those cases. It appeared on the face of the proceedings that the suit had abated, for the personal representative of the plaintiff was acting in the matters before the Court; and it would be well that the Court itself should exercise its vigilance, and see that decrees and orders were not made which were not justified by the facts, and that the officers of the court performed their duties. 7. Upon the objection that the tenant for life retained the rents, and the sale was made partly for the interest, which he ought to have kept down, he said that it was admitted in argument that that would not be a ground to affect a purchaser who was not a party to the fraud (I), and he held that the

(I) He added that since he had sat in that court he had had, in more than one instance, considerable difficulty in preventing interest properly payable by the tenant for life from being thrown on the inheritance, though all parties were represented by counsel before him.

arrangement between Bowen and Bruce was not fraudulent on the part of the latter, but as he was a party to that transaction he should make him responsible to the extent of the burthen improperly thrown on the estate.

23. In regard to the merits, the Lord Chancellor held that the suit was regularly instituted, and that there were proper parties to it. There was no doubt that a sale had been agreed upon before the suit was instituted, but after the decree the estates were again advertised for sale, he thought not fraudulently, although it was not anticipated that any person would be found who would bid more for the estates than Bruce had, and that it was at that time anticipated that he would become the purchaser in pursuance of the pre-existing arrangements, although under the forms and machinery of the decree. The ground upon which at that great distance of time it was attempted to impeach the sale was fraud, effected through the amicable sale; but because it was amicable it did not follow that it was fraudulent; he held that it was a *boná fide* suit: he also held that it was not proved that the sale was colourable: the other bidders were solicitors of the court and persons of respectability. Although therefore the machinery of the court was made use of to carry into effect the previous sale, yet there was no damage done to the inheritance, as he was of opinion that the estate was not sold at an undervalue, and was not more valuable when the purchase was completed by payment of all the money in 1797. It admitted of no doubt that the actual sale was authorized by the will; that it was necessary in order to comply with the directions of the will; that it was adopted by the new trustees, as was shown by the execution of the conveyance of 1797; that it was adopted by the tenant for life, and to whose issue the estate was limited, so that the estate was in reality vested in his family; that it was also adopted by the widow, who was entitled to a jointure, and who, by the deed of 1797, released these lands from her jointure; and

there was the consent of the creditors, and also the Chief Remembrancer's certificate and the conveyance executed by him. That the sale was for full value was, in his opinion, clear: no reason was suggested why Henry should sell an estate which belonged to himself and his family at an undervalue—why he should make a present of it to Bruce; and he thought it clear that the whole purchase-money was paid. So that the sale being authorized by the will, necessary for the purposes of it, adopted by all parties for full value, and the purchase-money paid, it was impossible for him to impeach the sale itself unless he found fraud in the conduct of the purchaser. He then examined the evidence, and came to a conclusion in favour of the perfect *bona fides* of the transaction.

24. The Court then examined the authorities, and subscribed to the doctrine of Lord Eldon in Lloyd *v.* Johnes, 9 Ves. 37, and was content to be bound by the rule laid down by Lord Redesdale in Bennett *v.* Hamill, 2 Scho. & Lef. 577, but the decree was founded on Townsend *v.* Warren (*b*), where the sale was made pursuant to an arrangement entered into previously to the decree, and the decree was made use of for the purpose of giving effect to that prearranged sale. In these respects that case agreed with the present, but it went much further in other respects. The personal representative of the tenant for life, in Bowen *v.* Evans, was not before the Court, and the purchaser was made responsible for all the interest paid out of the purchase-money which the tenant for life ought to have paid. The case of Townsend *v.* Warren went far beyond what the Court proposed to decree. One of the defendants, in Bowen *v.* Evans, claimed for value under Bruce by a conveyance *before* the seller obtained his conveyance, and the bill was dismissed against him with costs. The sale of Bowensford was set aside, for, although a *bonâ fide* one, it was altogether behind the back of the Court, and no attempt had been made to complete it.

(*b*) *Supra*, p. 704.

From this decree there was an appeal by the plaintiff below to the House of Lords, and the appeal was dismissed and the decree affirmed with costs, on the motion of Lord Cottenham, C., Lord Campbell being present, but taking no part in the discussion (*c*).

(*c*) 1 September 1848.

SECTION IV.

OF PURCHASES BY PERSONS HAVING A CONFIDENTIAL CHARACTER.

1. *Cannot sell the estate to themselves: Blake* v. *Blake: judicial sale by creditor also executor, &c.*
2. *Observations thereon.*
3. *Waters* v. *Groom: purchase by execution creditor in possession with a mortgage with power of sale, from the owner's agent, valid.*
4. *Carter* v. *Palmer: barrister and agent consulted as to compromise cannot purchase outstanding claim after the connexion has ceased.*
5. *Bailey* v. *Watkins: purchase before the Master set aside by reason of bargain between one of the trustees for sale, who was manager of the works, and the purchaser.*
6. *Hamilton* v. *Wight: trustee for owner and creditors cannot buy for his own benefit an annuity subsequently granted by the owner.*
7. *Austin* v. *Chambers: issues to try whether a purchase at a sheriff's sale by a creditor who was an attorney, was as agent for the owner or in his character as attorney.*
8. *Charter* v. *Trevelyan: purchase by an attorney secretly in the name of a trustee, bad.*

1. THE rule in equity forbids persons having a confidential character to sell the estate to themselves; although, dealing at arm's length, they might be perfectly competent to treat with the owner for the estate. In Blake *v.* Blake (*a*), Bryan Blake, in 1798, bought a plantation in St. Vincent's for 24,960 *l.*, subject to several mortgages, one of which he paid off: by another of these mortgages the estate was vested in a trustee in fee, to sell and pay off the money. To meet

(*a*) Printed Cases, D. P. 1824. I was of counsel for the respondents.

the purchase-money, Blake drew bills on Messrs. O'Connor, in Ireland, who were his relations, and being pressed to give a mortgage, he executed one in fee to them, in April 1801, in St. Vincent's, for 12,000 *l.*, payable at the end of five years, with interest in the meantime, and it appeared by the evidence that they accepted this security. In August 1801 Blake died, and appointed the O'Connors his executors and guardians of his children, but the will was not executed so as to give effect to the appointment of guardians or to his disposition of his real estate. The O'Connors proved the will in Dublin, and on the same day the senior partner wrote to Blake's widow in Antigua in terms of affection, and desired her and her children to come to Ireland (which invitation she accepted, and in some time became the wife of the other partner); he added that as the concerns of his late cousin were many, and of the greatest consequence to her and her children, he had determined to send out his nephew, Hugh O'Connor, to attend most particularly to the affairs of Blake, especially at St. Vincent's, where there was so great a proportion of his property: he would carry with him a power of attorney from them as executors, to transact, manage, and do everything possible for the benefit of the concern. The power of attorney was simply to Hugh, the nephew, for them as executors, mortgagees, and creditors, to sue for, recover, and receive from the heir at law of Blake, and all other persons, all monies due to Blake or to them as executors, mortgagees, and creditors, with full power to institute suits, &c. In January 1802, the O'Connors having paid the bill drawn by Blake in his lifetime for the mortgage money, the fee was conveyed by the trustee, with the concurrence of the mortgagees, to the O'Connors, in fee, upon the trusts in the original mortgage mentioned. Hugh, when he reached St. Vincent's, caused an action to be prosecuted, in the names of the O'Connors, against Martin Blake, the infant heir of Bryan, for the whole sum claimed by the O'Connors, including the 12,000 *l.* secured by the mortgage,

and in which action a person was admitted as guardian for the infant, but a judgment was recovered for upwards of 21,000 *l.* on the 16th June 1802, and an execution issued to sell the plantation, and Hugh purchased it for 8,571 *l.* sterling, and the provost marshal on the 27th July 1802 conveyed to him in fee all the right and equity of redemption of Martin Blake in the plantation, but it was not stated in the advertisement or in the conveyance what the mortgages amounted to. The next day Hugh declared himself a trustee for the O'Connors, and in February 1803 conveyed the estate to them in fee. On the 31st July 1802 Hugh obtained a conveyance from the other mortgagee to the O'Connors, on payment of the balance due to them, the O'Connors having paid the rest by bills drawn by Bryan Blake in his lifetime. There were only two bidders at the sale, Hugh and the provost marshal himself. In June 1816 the infant Martin filed his bill in the Court of Chancery of Ireland to set aside the sale as void, the O'Connors having been executors, acting guardians, mortgagees, trustees for sale, and general agents of Bryan. Hugh was examined by both parties; he said that taking the incumbrances into account the purchase-money was 44,500 *l.* Irish [but this was not made out]; he said he did not at the time of sale think he gave so much for it, for if he did [had so thought] he believes he would not purchase [have purchased] the same; he said he had no power to buy for the O'Connors, but bid upon his own judgment in order to secure the debt. He said that the price was the full value, the sale fairly conducted, and that a purchaser to whom the O'Connors offered the estate would only give 40,000 *l.*, payable by yearly instalments of 10,000 *l.* Lord Manners, C., in effect supported the purchase, but directed certain accounts to be taken. It was said by counsel for the respondents in the House of Lords, that the Lord Chancellor meant to charge them with 44,500 *l.* as the amount of the purchase-money, even if they were not able to make up that sum. Upon an appeal to the House of Lords this

decree was reversed, except so far as it directed certain accounts; and it was declared that the purchase of the estate ought to be deemed fraudulent and void against the appellant, and that the same should be set aside accordingly.

2. The reversal proceeded upon solid grounds. The letter to the widow was calculated to throw her off her guard, and did not accord with the real object of the power of attorney, the interests of the infant were not protected, and the O'Connors were not justified in enforcing the immediate payment of the 12,000 *l.* secured by the mortgage to them. There was no sufficient intimation of what it was which was sold, so that Hugh himself says he gave more for the property than he thought he had; and the characters filled by the O'Connors rendered it impossible for them to purchase the estate whilst there was no protection afforded to the infant, or in other words to force a judicial sale to themselves; although as executors and creditors they might have given a preference to their own debt. The fact that Hugh bought without any authority was a circumstance to show *bona fides*, but could not alter the character of the purchase, as the O'Connors adopted the act of their agent.

3. In Waters *v.* Groom (*b*), Waters had bought the Opera House at a sale before the Master. Birch & Chambers, the bankers, advanced him sums to enable him to pay the purchase-money, and he gave them a security on the Opera House for all monies which they had paid or might pay to him. In August 1817 the bankers advanced 28,000 *l.* to Waters to pay into court, and thereupon, by a deed of 25th August 1817, in consideration of the advances, Waters agreed, upon the request of the bankers, to assign to them the Opera House, by way of security for the monies advanced, and in the assignment should be inserted an absolute trust or power to sell, as the bankers should think

(*b*) 11 Cla. & Fin. 684; 3 Sim. 42, *nom.* Chambers *v.* Waters, 1 Coop. temp. Brough. 91.

expedient, to repay the loans, but subject to a stipulation that no sale should take place without three months' previous notice in writing to Waters. And it was provided that all the powers intended to be created as above might be exercised previously to the execution of such deed. Waters at the same time, as a further security, gave a warrant of attorney for 80,000 *l.*, on which judgment was shortly afterwards entered up. In 1819 all parties assigned the property to Mills, a solicitor, to secure his debt. In July 1820 an execution was issued on the judgment, and Chambers, who survived Birch, and had made further advances to Waters, was in possession of the property. On the 25th August 1821, Mills, under an authority from Waters to sell, entered into an agreement to sell the property to Chambers for 80,000 *l.*, with very special provisions. As Waters was abroad, it was stipulated that in case he should not confirm the contract within two months from the date thereof, it was to be void, and Chambers was to be treated as tenant for one year. On the 10th September following Waters, by deed-poll, confirmed the agreement, but he afterwards resisted the performance of the contract, on the ground that Chambers was a trustee for sale. Upon a bill filed by Chambers for a specific performance, Sir L. Shadwell, V. C., was of opinion that the bankers were not, as it was alleged, trustees, but that they had that instrument executed by way of security only, and that they could not have become trustees unless they had taken a conveyance from Waters, in consequence of their own request, which would have given them a power of sale, or unless, without a conveyance, they had taken upon themselves to execute a power of sale, which by the last proviso in the deed it was declared that they should be at liberty to exercise without such conveyance. He was of opinion that Chambers had not taken upon himself to execute the powers given by the deed of 1817, and that he stood merely in the situation of a person who had a security upon the Opera House of an equitable nature,

with a power of sale; and he accordingly decreed a specific performance, and this decree was affirmed by Lord Brougham, C., upon an appeal; and upon an appeal to the House of Lords the decrees were affirmed, with costs, on the motion of Lord Lyndhurst, C., with the concurrence of Lord Brougham and Lord Campbell. The Lord Chancellor thought that the transaction was made out by the evidence to be a correct and fair transaction, and that the agreement was one which a court of equity would enforce.

4. Where a barrister acted as counsel for another, and also acted so far as his agent as to be affected with all the liabilities which attach to that character, he was not permitted to hold a security on the estate of his client, which he had purchased at a little more than a third of its value (but the validity of which, for the whole sum claimed had been disputed, and the barrister had repeatedly been consulted with a view to a compromise), for more than the price which he actually paid for it, although his acting as counsel or agent ceased in August 1831, and he did not finally become the purchaser of the security until the middle of 1833. It was considered that the knowledge he acquired as counsel and agent enabled him to make the purchase, and that by that purchase he had precluded his client from himself making an advantageous compromise. And the incapacity to make such a purchase for his own benefit was held to continue to the time of the purchase, as the reason for the disability continued to operate after the employment had ceased (*c*).

5. A purchase by auction by a person not connected with the property, of iron works sold under an order in the Court of Chancery at a large price after a severe contest with

(*c*) Carter *v.* Palmer, 1 Dru. & Walsh, 722; 8 Cla. & Fin. 657; Lord Plunket's decree affirmed. See 11 Bligh, N. S. 397, the first appeal, where a cross bill was held to be necessary against the bill filed by the barrister to enforce the security. See Maccabe *v.* Hussey, 2 Dow & Cla. 440; 5 Bligh, N. S. 715, where conveyances obtained by a barrister and agent from a widow were set aside for fraud and undue influence and misrepresentation.

Lord Bute, was set aside by Lord Eldon, C., after payment into court of all the purchase-money, both for the estate and the stock, which was valued, and after the acceptance of the title, and the delivery of the possession, and the carrying on of the works by the purchaser, on the ground that one of three trustees for sale under the late owner's will, who had been and was continued as resident manager of the works, and was consulted as to the sale, and the reserved price, and by whom, or by whose direction the stock was valued, had previously to the sale accepted an agreement from the intended purchaser that if the latter should become the purchaser at a price not exceeding 63,000 *l.*, he was to charge five per cent. interest by way of rent to himself, and to be a partner for one half share in carrying on the works, and the manager and a brother of the intended purchaser to be partners each for one quarter share therein, and to find their proportion of the capital; and this order was made notwithstanding that in consequence of the price having amounted to 72,000 *l.* the agreement was not deemed binding, and ultimately the purchaser paid to the manager 1,500 *l.* as a compensation for his loss of a share in the partnership. Upon an appeal to the House of Lords the appeal was dismissed, and the order affirmed (*d*).

6. A man created a trust of his property for the payment of an annuity to himself and then to pay his creditors, and afterwards joined as a surety in a bond to secure a life annuity to a third person, redeemable on payment of 2,000 *l.* (the price paid for the annuity), which was afterwards purchased by a person who had on the resignation of the trustee under the deed for the creditors been, previously to the purchase, appointed as a new trustee. The case arose in Scotland, and the Court of Session, reversing a decision of the Lord Ordinary, decided that Wright, the trustee, was capable of purchasing for his own benefit the annuity which, it will

(*d*) Bailey *v.* Watkins, Printed Cases, D. P. 1825. I was of counsel for the appellant. See 6 Bligh, N. S 275, n.

be observed, was granted subsequently to the trust deed, and was not secured upon the trust property. This was decided in proceedings taken by the personal representatives of the trustee, who was dead, to recover the arrears of the annuity. Upon an appeal to the House of Lords, upon the motion of Lord Brougham, with the concurrence of Lord Lyndhurst, C., and Lord Campbell, the Lords reversed the judgment of the Court of Session. This restored the order of the Lord Ordinary, which in substance was that the grantor was entitled to the benefit of the purchase upon payment of the price paid by the trustee, with interest. The case was decided upon general principles, although some stress was laid on the particular trusts in the deed, and it was considered that the purchase placed the trustee's interest in opposition to his duty (*e*). The purchaser gave 2,000 *l*., the sum originally paid for the annuity, so that the question really was, whether he should hold the thing which he purchased, viz., the annuity, which was subject to redemption, or retain it simply as a security for his purchase-money and interest. In this view, there appears to have been considerable difficulty in the way of the decision in the Lords. The annuity was in arrear from 1822, when it was purchased, to 1840, when the litigation commenced. The Lord Ordinary observed that the transaction had turned out to be a lucrative one, because Lord Strathmore, for whose life the annuity was granted, was still alive, and the annuity even to the present period, and independently of future years, was worth more than the purchase-money and any interest that might be due upon it. Wright was not under any legal disqualification from acquiring, but being trustee for Hamilton, who created the trust, and bound as such to enlarge his and the creditors' funds, he could only acquire for behoof of the trust estate (I). This was the general principle of the law of

(*e*) Hamilton *v.* Wright, 9 Cla. & Fin. 111; Printed Cases, D. P. 1842.

(I) The trust estate, as far as the creditors were interested, could not benefit by the purchase, although Hamilton might.

Scotland, and he had endeavoured to ascertain what the law of England was upon this subject, and if he were not mistaken in the import of the authorities, it was strongly against Wright. The Judges of the Court of Session who thought the original decision wrong, urged that Wright had no power to redeem against the will of Hamilton for his benefit. Would he have redeemed years ago? Suppose Lord Strathmore had died a year after the bargain. Besides Hamilton denied the validity of the bond, and if he had succeeded in that objection there would have been an end of the matter. The judgment of the House reversed the interlocutors of the Lords of Session and restored the interlocutor of the Lord Ordinary, and directed the Lords of Session to find the appellant entitled to his expenses in the cause in the Court of Session, as well subsequent as previous to the date of the last-mentioned interlocutor. The result, therefore, was to consider Hamilton as having redeemed the annuity in 1822. It was a strong measure to make Wright's representatives, in the absence of fraud, pay the costs.

7. In a case (*f*) from Ireland, where judgment creditors brought an estate of the debtor's to sale before the sheriff, and the attorney of the owner, who was himself an execution creditor, but who was not a party seeking to enforce a sale, attended the sale, and bidding beyond the judgment creditor was declared the purchaser at a sum which was exhausted in the payment of the debts prior to his own; the owner insisted that the attorney purchased for him as his agent, whilst the attorney swore that he acted for himself as judgment creditor. Lord Plunket, C., made a decree giving to the attorney the benefit of the purchase upon his releasing his client from the debt due to him; and, upon a rehearing, he directed an issue to ascertain the value of the property sold: upon an appeal to the House of Lords, it was held that neither of these decrees could be supported; the first substituted a new contract, and the second introduced an irrelevant

(*f*) Austin *v.* Chambers, 6 Cla. & Fin. 1.

question. The question was considered to be, whether the attorney bought as agent for the owner, or whether he bought as attorney, his client's property. Lord Cottenham, C., was of opinion that if either of these propositions were made out in the affirmative, the owner would be entitled to the benefit of the purchase, although he said that if the buyer was not acting with a view to the interests of his client, who had been his client before and was his client afterwards, he had a right undoubtedly to throw off his character of solicitor at that particular time, and to exercise the right which belonged to him in another character. As the evidence was not satisfactory, the House on the demand of the attorney directed two issues; first, whether at the time of the purchase he was acting as the attorney or agent for the owner with respect to the matter of the sale; 2dly. whether he bid for and became the purchaser, as the agent, for and on behalf of the owner. It appears that on the trial of these issues, upon which the attorney himself was examined, the jury found for the affirmative of both the issues, and of course the purchase was ultimately held to be a trust for the owner.

8. A purchase by an agent secretly in the name of a third person cannot be supported. In Charter *v.* Trevelyan (*g*), such a purchase was set aside after a great lapse of time. Sir John Trevelyan employed Thomas Charter as his solicitor, and also as his steward and receiver of a manor and estate in the county where the latter resided. Sir John being desirous to sell, the estates were valued at several sums, amounting in the aggregate to nearly 18,000*l.*, but not including some small portions of the property. Parts were sold and treaties were entered into by Charter to sell the residue for 13,000 guineas, but they were broken off, and afterwards Sir John wrote to Charter that he should have no objection to receive 13,000 guineas for the estate, and the sooner the better, as he knew how to apply the money.

(*g*) 11 Cla. & Fin. 714.

Charter then, without the intervention of Sir John, sold the principal part of the estate for 12,000 *l.* odd to Sir Thomas Acland, and no complaint was made in regard to this sale. A few weeks after the conveyance to the purchaser, Sir John conveyed the residue of the estate to James Charter (a cousin of Thomas's), for a sum which being added to the last-mentioned purchase-money made exactly 13,000 guineas. The contract for this lot was stated by Thomas to Sir John to have been made with James as the purchaser: a month afterwards James conveyed to Thomas as the real purchaser. Sir John was ignorant of the execution of this deed. Disputes several years afterwards arose between Sir John and Thomas Charter, and an award was made under an arbitration referring all causes of action, suit, and claims; but upon that arbitration, Thomas represented James as the purchaser, and concealed the fact that he was himself the purchaser. The price paid for the residue of the estate by Thomas, according to the valuation before mentioned, was greatly below its value. After the lapse of many years Thomas's son after his death applied to Sir John's solicitor for a title-deed, in a letter stating that this estate was sold to Sir Thomas Acland, of whom it was purchased by his late father. This new statement led to an inquiry, and a bill having been filed to set aside the sale to Thomas Charter, Sir C. Pepys, Master of the Rolls, made a decree accordingly, which, upon an appeal to the House of Lords, was affirmed with costs, upon the motion of Lord Lyndhurst, C., and with the concurrence of Lord Cottenham (who supported his decree) and Lord Campbell. The Lord Chancellor said, that when an agent, employed to sell, becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the just value of the property so purchased (I), and

(I) It is settled that such a purchase cannot be sustained, although the full value was given for the estate.

this must be shown with the utmost clearness and beyond all doubt. He came to the conclusion that Sir John was unacquainted with the fact that James Charter was not the purchaser even at the time of the arbitration, and that the estate conveyed to him was sold at about a third of its value, an under-value so great as to admit, he thought, of only one explanation, viz., that finding Sir John was willing to sell the whole property for 13,000 guineas, and that Sir Thomas Acland was willing to pay 12,000*l.* odd for his part, he availed himself of the opportunity of getting the residue for the sum required to make up the 13,000 guineas, without regard to the actual value, thinking that Sir John would be satisfied with realizing that sum, and would not inquire into the details.

APPENDIX.

No. 1.

Resolutions proposed on the Appellate Jurisdiction of the House of Lords and the Court of Chancery.

SIR EDWARD SUGDEN.

1. THAT it is expedient to abolish the Court of Review in Bankruptcy, as far as regards the Judges of that court, and to restore the jurisdiction of the Great Seal and the Vice Chancellor.

2. That it is expedient to abolish the Judicial Committee of the Privy Council, and to remodel the court.

3. That it is not expedient to take away any equity Judge from his court for the performance of judicial functions elsewhere without an absolute necessity.

4. That it is expedient, in the contemplated creation of new courts of equity, to make provision for the independence of the Judges, and, by orders of court, to make provision for the regular hearing of causes according to their priority, so that no cause may be advanced out of its turn without sufficient cause; and for the regulation of the hearing of short causes, so that important points of law may not be decided hastily and without due deliberation; and also provision for having in each court a list of the judgments in arrear always hung up in court, and a copy thereof delivered to the Judge by the registrar on the first Monday's sitting in every month; and likewise provision that no case be postponed in hearing on account of the absence of counsel in another court, unless (if the judge shall think fit) where the counsel has followed a case upon appeal.

5. That it is expedient that the appointment of the Masters in Chancery should again be vested in the Lord Chancellor instead of the Crown, and that the Masters' offices should be remodelled, and their sittings be made public.

6. That it is expedient that the Lord Chancellor shall continue to hear motions, appeals, and other matters in the Court of Chancery, and that causes be re-heard in the courts below; but that no appeal be re-heard by the Lord Chancellor.

7. That it is expedient that the decision of the Lord Chancellor

shall be final where both parties have entered with the registrar a consent that the appeal be heard by the Lord Chancellor; and that the Lord Chancellor's decision, whether in the first instance or upon appeal, in interlocutory matters, should be final, subject to certain exceptions.

8. That it is expedient that the court of appeal in the House of Lords should consist of the Lord Chancellor and two Judges, to be appointed during good behaviour, and to be called Lords President, but not necessarily to be Peers; and that the Lords President be at liberty to act as Judges during the hearing, and to openly deliver their judgments, but not to have voices if not Peers.

9. That it is expedient that the House of Lords, when the arrear of appeals may render it necessary, should sit to hear appeals only, notwithstanding a prorogation.

10. That it is expedient that the House of Lords should have the power of summoning the equity Judges upon the hearing of appeals, in like manner as they have the power of summoning the fifteen Judges.

11. That it is expedient that the appeals in the House of Lords should be heard with as many of the forms and regulations of the superior courts of justice as are consistent with the jurisdiction and authority of the House.

12. That it is expedient that the two Lords President should sit and hear the matters now referred to the Judicial Committee of the Privy Council; and, with that view, that the Privy Council should be remodelled as a court.

13. That it is expedient that the Lords President sitting in the Privy Council should have power to call to their aid any other Judge, except the Lord Chancellor, and that the Lord Chancellor might attend, upon their request, if he should think it proper.

14. That it is expedient that one of the Lords President should be styled Chief Lord President, and should preside at the Privy Council whenever another Judge is called in.

15. That it is expedient that where the two Lords President sit alone, but cannot agree, the case should be adjourned into the House of Lords, to be there heard and decided like any other case (*a*).

16. That it is expedient that the hearing of the appeals before the House of Lords and the Lords President respectively, should, as far as possible, be so regulated as to give to the House of Lords and the Court fixed days for hearing of appeals through every sitting.

(*a*) See s. 7 of the Bill.

No. 2.

A BILL for facilitating the Administration of Justice in the House of Lords and the Privy Council.

WHEREAS it is expedient to make certain provisions for the more effectual hearing of appeals in the House of Lords, and for the more effectual hearing of appeals to Her Majesty in Council, and on other matters: Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful for Her Majesty, her heirs, and successors, to nominate and appoint from time to time, by letters patent under the Great Seal of the United Kingdom, two fit persons, being or having been respectively barristers-at-law, of 15 years standing at the least, to be Judges Assistant to the House of Lords, in the discharge of the judicial functions of the said House, and also, being respectively Members of Her Majesty's Privy Council, Members Assistant of the Judicial Committee of the Privy Council; and each of the said two persons for the time being shall be called Lord Assistant of the House of Lords in the matter of appeals and writs of error; and such persons for the time being may act in the performance of the duties hereinafter imposed upon them, although not respectively members of the said House of Lords.

Preamble.

1. Her Majesty empowered to appoint Two Judges Assistant to the House of Lords.

And be it enacted, that such Lords Assistant shall have full power and authority to assist in the hearing of all appeals heard before the House of Lords, and to act as Judges during the hearing, and to deliver in the House the reasons of their opinion, in the same manner as if they were acting as Judges in an inferior court; but no such person is to have a voice in the decision, unless he be a Peer of Parliament.

2. Powers of Judges Assistant.

And be it enacted, that the House of Lords shall have the like power and authority to summon to their assistance, upon the hearing of appeals, the Master of the Rolls, and

3. House of Lords to have power of calling in the assistance of

the Master of the Rolls and Vice Chancellors.

the several Vice Chancellors, or any of them, as they now enjoy in summoning for the same purpose the Judges of England.

4. Judges Assistant, being Privy Councillors, to be Members of the Judicial Committee of the Privy Council.

And be it enacted, that the said two Lords Assistant for the time being (being respectively members of Her Majesty's Privy Council) shall be respectively members of the Judicial Committee of the Privy Council, and that no matter shall be heard, nor shall any order be made by the said Judicial Committee, in pursuance of the powers given to them by an Act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled, "An Act for the better administration of Justice in His Majesty's Privy Council," unless in the presence of the said two Lords Assistant; or in case of the sickness or unavoidable accident of either of them, in the presence of the other of them; but in case of the sickness of both of them, any matters may be heard according to the directions of the said Act of the third and fourth years of his said late Majesty.

5. One of such Judges Assistant to be styled Chief Lord Assistant.

And be it enacted, that one of the said Lords Assistant for the time being shall be appointed by his patent Chief Lord Assistant, and shall preside at the Privy Council, in the absence of the President for the time being of the Privy Council and of the Lord High Chancellor of Great Britain for the time being.

6. The Two Judges Assistant to be competent of themselves to decide matters before Privy Council.

And be it enacted, that the said two Lords Assistant shall of themselves constitute a sufficient number of the said Judicial Committee to hear any matter and make any order, notwithstanding any provision to the contrary thereof in the said Act of the third and fourth years of his late Majesty King William the Fourth.

7. Provision for cases where the Judges Assistant cannot agree.

And be it enacted, that if in any case where the said two Lords Assistant alone constitute the Committee, they shall not be able to agree in opinion upon any matter heard by them, the further hearing shall be adjourned to some convenient day, when the Lord High Chancellor of Great Britain or the Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain (being a member of the said Privy Council) can attend the said Committee, and thereupon the hearing shall be resumed and the

matter decided in the presence and with the assistance of the said Lord High Chancellor or Lord Keeper or First Lord Commissioner of the Great Seal.

8. Repealing provision of Act 3 & 4 Will. 4.

AND whereas by the said Act of the third and fourth years of the reign of his late Majesty King WILLIAM the Fourth it is enacted, that such appeals, causes and matters, as shall be referred by his Majesty to the said Judicial Committee of the Privy Council, shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to his Majesty in Council for his decision thereon, as theretofore, in the same manner and form as had been theretofore the custom with respect to matters referred by his Majesty to the whole of his Privy Council or a Committee thereof (the nature of such report or recommendation being always stated in open court): AND whereas the said recited provision tends to delay and inconvenience; BE it therefore Enacted, That so much of the said recited Act as is hereinbefore recited shall be and the same is hereby repealed.

9. Orders of Judicial Committee to be final.

And be it Enacted, That the order of the said Judicial Committee in or upon any appeal, cause or matter referred to them by Her Majesty, Her heirs or successors, shall, without any recommendation to Her Majesty, or any decision by Her Majesty thereon, be of itself final and binding in like manner as a recommendation to Her Majesty in Council, and a decision by Her Majesty thereon, would have been under the said recited Act and this Act, if the said provision hereinbefore recited had not been repealed by this Act, and the present provision in lieu thereof had not been hereby enacted.

10. Judicial Committee to make necessary orders without referring to Her Majesty in Council.

AND whereas by the said recited Act it is enacted, that the order or decree of his Majesty in Council, on any appeal from the order, sentence or decree of any court of justice in the East Indies, or of any colony, plantation or other his Majesty's dominions abroad, shall be carried into effect in such manner and subject to such limitations and conditions as his Majesty in Council shall, on the recommendation of the said Judicial Committee, direct; and that it shall be lawful for his Majesty in Council, on such recommendation, by order, to direct that such court of justice shall carry the same into effect accordingly;

and thereupon such court of justice shall have the same powers of carrying into effect and enforcing such order or decree as are possessed by or are hereby given to his Majesty in Council: AND whereas it is expedient that the powers of the said Act given as last aforesaid to his Majesty in Council should be vested in the said Judicial Committee; BE it therefore Enacted, That the said Judicial Committee, in the cases provided for by the said Act of Parliament, and lastly hereinbefore mentioned, shall make the necessary order or decree at once, instead of recommending it to be made by Her Majesty; and their order or decree shall have the like force and effect as if made by Her Majesty in Council, upon the recommendation of the said Judicial Committee; and such court of justice as aforesaid shall have the same powers of carrying into effect and enforcing such last-mentioned order or decree as by the said recited Act were given to them over the orders and decrees to be made in the form thereby required.

11. Rank of Lords Assistant. And be it Enacted, That such Lords Assistant shall have rank and precedence next to , and the Chief Lord Assistant shall have precedence over the other Lord Assistant.

12. Lords Assistant to have certain officers. And be it Enacted, That it shall be lawful for Her Majesty, Her heirs and successors, in and by such Letters Patent as aforesaid, or in and by any other Letters Patent under the Great Seal of the United Kingdom, to direct that each of such Lords Assistant shall have a Secretary and Trainbearer.

13. Lords Assistant may be removed. Provided always, and be it Enacted, That it shall be lawful for Her Majesty, Her heirs and successors, to remove any such Lord Assistant from his office upon an Address from both Houses of Parliament.

14. Judges Assistant to take an oath before entering on duties of office. And be it Enacted, That each Lord Assistant, previous to his executing any of the duties of his office, shall take the following oath, which the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal for the time being, are hereby respectively authorized and required to administer; (videlicet)

"I, do solemnly and sincerely promise and swear, That I will duly and faithfully, and to the

best of my skill and power, execute the office of Lord Assistant to the House of Lords."

15. Salaries to Lords Assistant.

And be it Enacted, That from and after the appointment of any such Lord Assistant, there shall be issued and paid and payable out of and charged upon the Consolidated Fund of the United Kingdom of Great Britain and Ireland (after paying or reserving sufficient to pay all such sums as have been directed by any former Act of Parliament to be paid out of the same, but with preference to all other payments which shall hereafter be charged upon the same) the sum of to each such Lord Assistant as he shall be so appointed, as and for a yearly salary; the yearly sum of to each Secretary; and the yearly sum of to each Trainbearer; the said several salaries to be paid from time to time quarterly, free and clear from all taxes and deductions whatsoever, on the Fifth day of January, the Fifth day of April, the Fifth day of July, and the Fifth day of October, by equal portions; the first payment to be made on the first of such days respectively as shall occur after the appointment of the person entitled to receive the same.

16. Retiring allowance to Lords Assistant.

And be it Enacted, That upon the resignation of any such Lord Assistant, it shall be lawful for Her Majesty, by Her Letters Patent under the Great Seal of Great Britain, to give and grant unto the person so resigning (under and subject to the same conditions, limitations and restrictions as any annuity on resignation can now by law be granted to the Vice Chancellor of England) an annuity during his life not exceeding the sum of , yearly, to be paid and payable out of and charged upon the Consolidated Fund, free and clear of all charges and deductions whatsoever, by even quarterly payments, to be made respectively on the days aforesaid in every year.

17. Lords Assistant not to sit in House of Commons.

And be it Enacted, That no Lord Assistant shall be capable of sitting or voting in the House of Commons, or of being elected to serve in the House of Commons.

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